82-401

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

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ALEXANDER L. STEVAS,
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BAXTER RICE, Individually
and as Director of the Department
of Alcoholic Beverage Control
of the State of California

Petitioner,

v.

EVA REHNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the states under the Twenty-first Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

The petitioner, Baxter Rice, Director of the Department of Alcoholic Beverage Control of the State of California respectfully prays that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 8, 1982.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on June 8, 1982. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the

Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the states under the Twenty-first Amendment.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI, section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

United States Code, Title 18:

§ 1161:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, † 2, 67 Stat. 586."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. section 1331 because the amount in controversy exceeded $10,000 and the controversy arose under the constitution, laws, or treaties of the United States. Jurisdiction was also invoked under 28 U.S.C. sections 2201 and 2202.

Eva Rehner is a member of the Pala Band of Mission Indians and owner and operator of a general store on the Pala Indian Reservation in San Diego County.

Petitioner is the Director of the Department of Alcoholic Beverage Control of the State of California (hereafter, the Department). The dispute arose because Mrs. Rehner wishes to sell distilled spirits at her store and was informed that petitioner would require her to obtain a license from the Department in order to do so.

On February 10, 1977, Mrs. Rehner filed a complaint for declaratory judgment, mandatory injunction, and preliminary injunction. On March 7, 1977, petitioner moved to dismiss or for summary judgment on the ground the Department had the authority to require Mrs. Rehner to obtain a state license under 18 U.S.C. section 1161. Judgment granting the motion to dismiss without leave to amend was filed and entered on May 11, 1977.

/

On June 8, 1982, the Court of Appeals reversed and held section 1161 preempted state licensing and distribution jurisdiction over tribal liquor sales in Indian country; accordingly, as long as Mrs. Rehner complied with a tribal ordinance, she was not required to obtain a California license to sell liquor in Indian country. See Appendix, p. 37.

REASONS FOR GRANTING THE WRIT

1. The decision below has addressed an important question of federal law concerning the relationship between the states and Indian tribes regarding the distribution and licensing of alcoholic beverages which should be resolved by this Court.

Deeply ingrained in our history, aside from that turbulent period between 1920 and 1933 when prohibition was in

effect, is state control over the sale and distribution of liquor. Regulation of one sort or another as an exercise of the states' police power exists in all 50 states and the District of Columbia. In California, the people have provided in their Constitution for regulation through licensing. Cal. Const. Art. XX, § 22. Other states such as Washington seek to achieve these goals through a state monopoly system. See generally Title 66 RCW; Appendix pp. 46-47. The Twenty-first Amendment recognizes the vital interests of the states in this area and has increased the power of the state to deal with matters regarding alcoholic beverages. Collins v. Yosemite Park Co. (1938) 304 U.S. 518, 538.

With respect to liquor traffic on Indian lands, Congress for more than 150 years simply prohibited the sale or disposition of liquor to an Indian, or the

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introduction of liquor into Indian country. 18 U.S.C., section 1154. (See Appen. B.) But in 1953, Congress enacted 18 U.S.C. section 1161 which made section 1154 inapplicable provided the act or transaction ". . . is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country. . . ." It is the interpretation of this statute with which this proceeding is concerned.

(1) The Decision Below Raises Significant Problems Concerning the Relationship Between States and Tribes Over Administration of Liquor Traffic

Plainly, section 1161 delegates authority over reservation liquor transactions to both the state and the tribe. The court in United States v.

Mazurie, (1975) 419 U.S. 544, permitted the delegation to the tribes because the tribes held a measure of sovereignty over both its members and its territory. Id., at 557. But states too have at least the same, if not greater measure of sovereignty over the subject matter in territory of an Indian reservation located within their borders, particularly where a state, like California, has been granted civil and criminal jurisdiction over matters pursuant to Public Law 280 (18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a)). See Washington v. Yakima Indian Nation (1979) 439 U.S. 463. Therefore, a state as well as an Indian tribe can be the recipient of congressionally delegated power to regulate transactions on an Indian reservation.

The court below impliedly agreed that a delegation of authority to regulate liquor transactions was made to the states

by section 1161, but construed the statute to allow the state to be nothing more than "the source of law to be applied by the tribal government." Appendix, p. 16. At another point, the court opined ". . . that section 1161 incorporates only state substantive standard and not state licensing and distribution jurisdiction. . ." Appendix, p. 22.

Realistically the result of the court's interpretation of section 1161 is that California, regardless of the plain language of section 1161, regardless of the Twenty-first Amendment to the Constitution, regardless of its historical powers to control matters involving liquor within its borders, and regardless of Congress' intent in Public Law 280 that California assume civil and criminal jurisdiction over tribal matters, lacks any power to protect its citizens, both Indian and non-Indian alike,

from the traditional problems associated with the sale and distribution of liquor if such acts occur in Indian country within its borders. According to the court below, California cannot license Indians who sell liquor on reservations and therefore cannot enforce any of its laws through actions against the licensee, nor can California even bring an action for declaratory or injunctive relief against a tribe to compel it to enforce California standards. (Appen., p. 36.) In other words, the California Legislature may pass laws called "substantive state standards," but California cannot enforce those laws on Indian reservations. Viewed nationally, in addition to 50 states regulating the sale and distribution of liquor, there are now more than 100 tribes which have enacted ordinances legalizing liquor traffic and which now have the exclusive power to

control liquor transactions within their borders. Rev. 217, 219, 227, table 4 (1977).

Surely Congress did not intend, by removing the 150-year-old ban of sales to Indians, that Indian tribes were now to be accorded the exclusive power to engage in the complex regulation of this product. To permit Indian tribes to assume exclusive control over the traffic of alcohol on Indian lands will clearly fragment state control over the importation, distribution, and sale of alcohol. While the states, through their respective elected congressional delegations, have some influence as to how Congress exercises federal powers vis-a-vis the states, no similar constitutional mechanism exists with respect to the actions of Indian tribes. Where, as in the present situation, Congress had delegated its

power, the state vis-a-vis the tribes is entitled to the protection accorded it under the Twenty-first Amendment.

An interpretation of section 1161 which allows both the states and the tribes to enforce their laws is consistent with the wording of the statute and the states' historical role as protector of the public in liquor matters. California is a licensing state. Whether a licensee, or a potential licensee, is an Indian residing on an Indian reservation, or a non-Indian, the law should be the same and the standards the same.

The system created by the court below works against rather than in support of this result. Assuming the tribal government has authority to enact an ordinance governing liquor transactions on its reservations, it must, according to the court, comply with "substantive state

standards." What are "substantive state standards?" Nc definition or any discussion of what is meant by this phrase appears in the court's decision. Which California laws must be followed by the tribe, and who makes this decision -- the states, the federal government, the tribes, or the federal judiciary -- are questions unanswered by this decision.

There are additional unanswered questions. Who enforces substantive state standards? The people of California have declared in their Constitution they expect the Department to carry out its functions to adequately protect them from the traditional problems associated with the unlawful sale of alcoholic beverages. Where alcoholic beverages are sold on Indian lands to non-Indians, or are sold by non-Indian lessees on Indian lands to non-Indians, must the people look now to

the tribes for proper enforcement of the states's substantive standards? If the tribes fail in their responsibility, what then? The court's decision holds the states cannot sue the tribes. And if reliance cannot be placed on the tribes, and the tribes cannot be sued, can the state turn to the federal government to enforce the state's substantive standards?

That the federal judiciary might be drawn into the situation in a very substantial way is not idle speculation. After all, United States v. Mazurie, supra, 419 U.S. 544, was a federal prosecution. If Indian tribes are unwilling or unable to enforce "substantive state standards," a violation of such a standard must either go unpunished or prosecuted in federal court as a violation of section 1154. Thus, a state which detects violations of its substantive state standards must obtain

investigative services from federal agencies, prosecutorial services from a local United States attorney, and the cases must therefore be brought in federal courts. Furthermore, all these problems are compounded when it is recalled there are more than 25 tribes within California which have enacted ordinances pursuant to section 1161. Note, 5 American Law Review 217, table 2, pages 224-227, supra.

If liquor transactions by Indians on reservations were limited to members of the tribe in the same manner military exchanges and officer's clubs limited their transactions to members of the military and dependents, the non-Indian people of a state such as California, might nevertheless be protected. But such is not the case. There is nothing in the Ninth Circuit opinion which limits sales by Indians on reservations to non-Indians nor

does the opinion give any consideration to the matter of non-Indian licensees conducting their business on Indian reservations.

In a heavily populated state like California, Indian tribes are not necessarily located in isolated areas. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one-half of the entire city, with the Indian lands interspersed among non-Indian lands in a checkerboard pattern. Agua Caliente Band of Mission Indians v. County of Riverside 442 F.2d 1184, 1185 (9th Cir. 1971). Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet on Indian land will be non-Indian. Yet on the basis of the Ninth Circuit ruling, it can

now be argued that California is prevented from exercising any control over the number and location of these businesses, and the manner in which these businesses are conducted.

While on the one hand, placing a substantial cloud over California's power to administer its liquor laws as they affect Indian and non-Indian alike, the Ninth Circuit decision on the other hand provides no guidance on how Indian tribes must implement state standards. The effect of this uncertainty extends beyond California and the Pala Reservation. It affects the nearly 300 Indian tribes in this country, every state in which an Indian reservation is located, more than 100 tribes which have legalized liquor transactions, and the non-Indians living on or near reservations which are potential customers of Indian liquor retail outlets. The "exceptional

importance" of the issues raised by this case is shown by the Ninth Circuit's decision to decide the case en banc. Rules of Appel. Proc., rule 35(a). Resolution of these very significant and substantial problems by this Court is necessary.

(2) The Effect of the Twenty-first Amendment on the Judicial Approach to Interpretation of 18 U.S.C § 1161

The Ninth Circuit in this case adopted the approach commonly employed by appellate courts in resolving disputes between Indians and non-Indians. The court noted those cases which require that ambiquities and statutes relating to Indians should be resolved in favor of Indians, and those cases which express disfavor with state jurisdiction over Indian lands. Appendix pp. 7-8, 26. From these premises, the court had but a short step to make to conclude that section 1161 does not confer

on the state's regulatory jurisdiction over on-reservation liquor transactions. What was not considered by the court below, and indeed what is not generally considered in an Indian case, is the constitutional basis for the state's action which precipitated the litigation. In a tax case, for example, the court sets forth the applicable principals governing Indian cases, weighs them against the less compelling features of the state's side, and then resolves the case. See e.g. Bryan v. Itasca County (1976) 426 U.S. 373; Moe v. Salish & Kootenai Tribes (1976) 425 U.S. 463; McClanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164; Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685.

What is significant and indeed novel about this case is that California's effort to impose its liquor regulatory system on Indian reservations within its

borders is that this effort has both constitutional - the Twenty-first amendment - and a statutory - section 1161 -- support. As this Court explained:

> "Both the twenty first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of each other and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324, 332.

This Court has not had occasion to consider the Twenty-first Amendment in light of the provisions which underlie congressional authority over tribal Indians. Compare Collins v. Yosemite Park Company, supra, 304 U.S. at 536-538; United States v. Mississippi Tax Comm'n (1973) 412 U.S. 363, 373-379; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599; Department of Revenue v. James Beam Co. (1964) 377 U.S. 341, 345-346; Hostetter v. Idlewild Liquor Corp., supra.

The constitutional derivation for federal authority over Indian matters is now considered to be the ". . . federal responsibility for regulating commerce with Indian tribes and for treaty making." McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. at 172, fn. 7. As the court there wrote:

> "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (Citation omitted.) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." Id. at p. 172.

The Twenty-first Amendment and section 1161 set the limits of state power. But in finding where that limit is, it is necessary for this Court to resolve this important conflict between the state's authority to regulate liquor transactions within its borders which is stated in

section 1161 and is supported by the Twenty-first Amendment, and the rights of Indians on a reservation to be free from state regulation except where Congress has provided otherwise. It is California's position that Congress has provided otherwise in section 1161, and that position is supported by the plain language of the statute itself, its legislative history, and the Twenty-first Amendment.

Equally unacceptable to the states is the Ninth Circuit's conclusion that if Congress intended to confer on the states' regulatory jurisdiction over liquor traffic on Indian lands, it should have been more specific. See appendix, pages 13, 16, citing Bryan v. Itasca County, supra. In contrast to a case where a state is attempting to exercise some aspect of its general regulatory jurisdiction under 28 U.S.C., section 1360, here California seeks

to exercise a power reserved to it by the Twenty-first Amendment. It is a strange rule of statutory construction which holds that Congress must expressly reserve such right to the states when it delegates its jurisdiction over the subject matter of that right to a non-federal entity. In other words, can Congress by silence confer autonomy on Indian tribes in derogation of a state's express constitutional rights?

Again, this court has not addressed in its previous Twenty-first Amendment cases, the conflict between a state's power under that amendment and the delegation of Congressional authority over Indian matters to a non-federal entity, i.e., the tribes. In short, the conflict is no longer between Congress and the states, it is now between the Indian tribes and the states.

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(3) Completion of the Task of Interpreting Section 1161

Section 1161 exempts sales of alcoholic beverages from the proscription in section 1154 if the sale is in conformity both with state law and a tribal ordinance. In United States v. Mazurie (1975) 419 U.S. 544, this Court considered the effect of a tribal ordinance which required a tribal license. Although the ordinance required both a state and tribal license, and the defendants obtained a state license, they failed to obtain a tribal license and were convicted under section 1154. The Court upheld a challenge to section 1161 on the ground of vagueness regarding the location of the bar, and affirmed Congress' power to delegate to the tribes the power to regulate a liquor business.

The teaching of Mazurie is that a person who seeks to engage in a liquor

business on an Indian reservation must satisfy the requirements of the tribal ordinance and if the tribal ordinance requires a tribal license, then one must be obtained. What the court did not address, or have to address, is whether, if state law also requires a license to engage the liquor business, one must be obtained in order to avoid prosecution under section 11 '. The writ should be granted in this case to permit the Court to complete the important task of construing section 1161.

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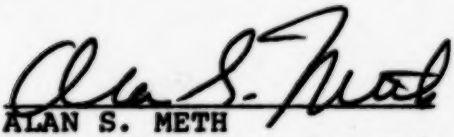
CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for writ of certiorari be granted.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Deputy Attorney General

ALAN S. METH,
Deputy Attorney General

By 
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Appendix A

[Filed June 8, 1982]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVA REHNER, Plaintiff-Appellee, v. BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California, Defendant-Appellee.	No. 77-2409
MUCKLESHOOT INDIAN TRIBE, Plaintiff-Appellees, v. STATE OF WASHINGTON, et al., Defendants-Appellant.	No. 79-4403
THE TULALIP TRIBES OF WASHINGTON, an Indian Tribe, Plaintiffs-Appellees, v. STATE OF WASHINGTON, et al., Defendants-Appellants.	No. 79-4404 OPINION

Before: BROWNING, CHOY, GOODWIN, WALLACE, KENNEDY, TANG, FARRIS, PREGERSON, POOLE, CANBY, REINHARDT, Circuit Judges

TANG, Circuit Judge:

The three cases involved in this decision arise under different facts, but the issue common to all is whether under 18 U.S.C. § 1161[1/] the states or the Indian tribes have licensing and distribution jurisdiction over Indian country liquor transactions. We conclude that under section 1161 the tribes have exclusive jurisdiction to license and distribute liquor on the reservation.

In No. 77-2409 (Rehner), Eva Rehner, a federally licensed Indian trader who owns and operates a small general store on the Pala Reservation in California, sought exemption from California law requiring a state license for retail sale of distilled spirits for off-premises consumption.

The Pala Band of Mission Indians had adopted an ordinance permitting the sale of intoxicating beverages provided that such sales were in conformity with the laws of California. The Secretary of the Interior certified the ordinance as required under section 1161. When the California Department of Alcoholic Beverage Control rejected Mrs. Rehner's request for an exemption, she brought an action in district court for declaratory and injunctive relief. The district court dismissed her action for failure to state a claim. It concluded that Mrs. Rehner was required to obtain a license from the State of California before she could lawfully engage in the sale of distilled spirits. She appeals.

In Nos. 79-4403 and 79-4404 (Muckleshoot and Tulalip), the State of Washington seized liquor in interstate

commerce destined for the Muckleshoot and Tulalip Indian reservations in Washington where the two tribes maintain retail liquor stores. Washington had assumed criminal and civil jurisdiction pursuant to Public Law 280[2/] (Pub. L. 280) over the Muckleshoot and Tulalip Indian Tribes in 1957 and 1958, respectively.[3/] The tribal liquor stores are operated pursuant to tribal ordinances enacted under authority granted by 18 U.S.C. § 1161 (1976), which permits reservation sales of liquor by Indian tribes when such sales do not otherwise contravene state or tribal law. Both ordinances were approved by the Bureau of Indian Affairs and certified by the Secretary of the Interior as required under section 1161.[4/]

Under these ordinances, no sales of liquor are permitted on the reservations except through stores owned and operated by

the tribal governments. The principal objectives of the ordinances are to regulate the sale of liquor on the reservations and to generate revenue for the tribes. The distribution of liquor in the tribal stores is consistent with state standards of conduct applicable to liquor transactions but the tribes have never applied for licensing from the Washington State Liquor Control Board [the Board]. Consistent with their authority under section 1161, the tribes contracted with the Central Liquor Company, a federally licensed distributor located in Oklahoma City, Oklahoma, for the sale of liquor to the tribes. In November and December of 1978, however, agents of the Board seized liquor moving in interstate commerce from the Central Liquor Company to the Muckleshoot and Tulalip Tribes.

Washington seized the liquor contending that its monopoly on the sale of liquor extended to Indian Country.[5/] Aside from tribal liquor stores Washington, through the Board, maintains an absolute monopoly on the sale of liquor within the state. Revenue earned through this state monopoly is distributed to local governments; none is distributed to the tribes.

The tribes brought actions in federal district court seeking injunctive relief and Washington counterclaimed, seeking injunctive and monetary relief. The district court held: (1) the tribes exercise exclusive regulatory jurisdiction under 18 U.S.C. § 1161 over liquor sales on the reservation; (2) the twenty-first amendment did not expand the States' jurisdiction over liquor sales on Indian reservations; and (3) Washington's

counterclaim was without merit. Washington appeals all three rulings.

II

Two canons of construction have been applied to statutes affecting Indian immunities. First, ambiquities in statutes relating to Indians are to be resolved in favor of the Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n. 17 (1978); Bryan v. Itasca County, 426 U.S. 373, 392 (1976); DeCoteau v. District County Court, 420 U.S. 425, 444 (1975). Second, state jurisdiction over reservations, historically, is strongly disfavored. The Supreme Court has emphasized that the policy of leaving Indians free from state jurisdiction is deeply rooted in the nation's history. Bryan, 426 U.S. at 376 n. 2; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973). Moreover, the Supreme Court has stated that "[s]tate laws

generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." Bryan, 426 U.S. at 376 n. 2, quoting McClanahan, 411 U.S. at 170-171. In view of this, we conclude that there is insufficient evidence to show that Congress intended section 1161 to confer on the states regulatory jurisdiction over on-reservation liquor traffic.

The federal government has long exercised pervasive and exclusive control over Indian liquor transactions[6/] through its authority under the Indian commerce clause,[7/] and Article II, section 2 of the United States Constitution.[8/] See McClanahan, 411 U.S. at p. 173.

In consideration of the history of exclusive federal control, the district court in Muckleshoot and Tulalip observed that unless section 1161 expressly authorizes

state jurisdiction over liquor transactions in Indian country, there could be no ground for concluding that Congress has removed its veil of preemption. It did not find such an authorization.

Our review of section 1161 and its legislative history together with an appraisal of other relevant statutes and administrative and judicial constructions of section 1161, confirms that conclusion.

A.

Washington and California argue that 18 U.S.C. § 1161 does not preempt the imposition of state distributive and licensing jurisdiction in Indian country. In reviewing this contention, we turn first to the language of the statute. See Reiter v. Sonotone Corp., 442 U.S. 330 332 (1979). Section 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, [federal statutes establishing

> criminal sanctions and procedures for Indian country liquor violations] of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161 (1976) (emphasis added).

Washington and California contend that, through section 1161, Congress delegated regulatory authority over reservation liquor transactions to the states. They argue that the language delegating such power is identical with respect to the tribes and to the state: Liquor transactions must be ". . . in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . " (emphasis

added). According to Washington and California, section 1161 requires the tribes not only to conform with substantive standards such as hours of operation and legal age for consumption, but also to observe and respect state requirements relating to the distribution and licensing of liquor.

Quite plainly an ambiguity in construction exists for the language of section 1161 suggests a contrary result to us. We agree with Washington that the statute's key clause requires liquor transactions to be "in conformity with both the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . " Our agreement ends here, however. Washington places an inordinate emphasis on the isolated phrase "laws of the State",

and concludes that state "law" includes exclusive jurisdiction to license and distribute.

Even if such a narrow focus on the phrase "laws of the State" apart from its context were justified, we would reach the opposite conclusion. Because the adjective "both" is distributive with regard to the phrases "laws of the State" and "ordinance duly adopted by the tribe", each phrase is equivalent and coextensive within the structure of the sentence. If we were to assume, as Washington does, that the phrase "laws of the State" implicitly permits exclusive state licensing and distribution jurisdiction, the grammatical logic of the statute would likewise require the implicit inclusion of a similar jurisdictional component in the phrase "ordinance duly adopted by the tribe . . . ." Washington's reading thus yields the unlikely result

that a licensing and distribution monopoly could vest in both the state and the tribes. There is no basis in the statute's structure for assuming that Congress intended courts to read a jurisdictional component into the phrase "laws of the State" and simultaneously to ignore the similar opportunity presented by the phrase "ordinance duly adopted by the tribe." Moreover, the finding of an implicit recognition of jurisdiction in the phrase "ordinance duly adopted by the tribe", is more tenable than the finding of an implicit grant of jurisdiction in the phrase "laws of the State," because grants of state jurisdiction over reservation Indians must be express, not implied. Bryan, 426 U.S. at 390. Tribal power over internal affairs, on the other hand, is inherent and may exist without a grant from Congress. United States v. Wheeler, 435 U.S. 313 (1978); see

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152-54 (1980).

In any event, Washington's focus is too restricted. The phrases "laws of the State" and "ordinance duly adopted by the tribe" must be read in light of the clauses modifying them. We note first that section 1161 is not cast in the form of a jurisdictional grant to anyone; it simply provides for the inapplicability of certain federal criminal statutes under specified conditions. Moreover, the specific clauses relied upon by the state do not support the implications the state would draw from them. The relevant language in section 1161 includes "laws of the State in which such act or transaction occurs" and "ordinance duly adopted by the tribe having jurisdiction over such area of Indian country". When presensted in full, the clauses in section 1161 distri-

buted by the word "both" yield a content inconsistent with Washington's thesis. Although the phrase "ordinance duly adopted by the tribe" is specifically modified by the word "jurisdiction", there is no corresponding jurisdictional adjective in section 1161 defining the scope of the "laws of the State". On the contrary, the phrase directly modifying "laws of the State" - "in which such act or transaction occurs" - contains no jurisdictional inference. Had Congress so intended, it could have captured the meaning of the clause modifying "laws of the State", while at the same time ceding jurisdiction to the states, by substituting the phrase "having jurisdiction over such act", for the phrase "in which such act or transaction occurs", and deleting the present reference to tribal jurisdiction. If Congress intended to confer jurisdiction over Indian liquor

buted by the word "both" yield a content inconsistent with Washington's thesis. Although the phrase "ordinance duly adopted by the tribe" is specifically modified by the word "jurisdiction", there is no corresponding jurisdictional adjective in section 1161 defining the scope of the "laws of the State". On the contrary, the phrase directly modifying "laws of the State" - "in which such act or transaction occurs" - contains no jurisdictional inference. Had Congress so intended, it could have captured the meaning of the clause modifying "laws of the State", while at the same time ceding jurisdiction to the states, by substituting the phrase "having jurisdiction over such act", for the phrase "in which such act or transaction occurs", and deleting the present reference to tribal jurisdiction. If Congress intended to confer jurisdiction over Indian liquor

transaction to the states, it could have expressly so stated. See Bryan, 426 U.S. at 390.

A close reading of the statute then, reveals that Congress recognized the tribes' jurisdiction over liquor transactions, with the state functioning only as the source of law to be applied by the tribal government. This meaning is supported by the statute's syntax as well as the language modifying the references to state law and tribal ordinances.

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B.

A comparison of section 1161 with statutes that are related to or in pari materia[9/] with it also supports our conclusion

that the tribes have distribution and licensing jurisdiction. We first compare section 1161 with Pub. L. 280 and The Termination Acts[10/] because both sets of legislation are in pari materia with section 1161. We then review the legislative history of section 1161 and Pub. L. 280, as well as related statutes - the Assimilative Crimes and Major Crimes Acts.

The Termination Acts are replete with language expressly conferring jurisdiction upon the states. Vague reference to the "laws of the State", as found in section 1161, was never assumed to suffice as a grant of jurisdiction.[11/] Similarly, a congressional intent simply to apply state standards or "laws of the State" in section 1161, standing alone, is insufficient to confer jurisdiction.

Like the Termination Acts, Pub. L. 280 illustrates clearly that Congress knew how to employ precise language when it wished to

transfer jurisdiction over Indian country to the states. Although Pub. L. 280 and section 1161 are related in subject matter, there is a conspicuous disparity in language between the two statutes.[12/] In contrast to section 1161, Pub. L. 280 expressly grants civil and criminal jurisdiction to the states. In so doing, Congress expressed its intent with words similar to those employed in its reference to jurisdiction of the tribes in section 1161. Compare 18 U.S.C. § 1162(a) ("Each of the states . . . shall have jurisdiction over offenses . . . .") (emphasis added), and 28 U.S.C. § 1360(a) ("Each of the states . . . shall have jurisdiction over civil causes of action . . . .")(emphasis added) with 18 U.S.C. §1161 ("ordinance duly adopted by the Tribe having jurisdiction . . . .")(emphasis added). There is no language in section 1161 indicating that the states were granted jurisdiction over Indian country liquor transactions.

In light of this repeated choice of terminology, Washington cannot merely point to the phrase "laws of the State" in section 1161 and infer that Congress intended a wholesale conferral of jurisdiction upon the states. When Congress extended jurisdiction to the states in Pub. L. 280, it not only expressly granted jurisdiction, but also classified and defined its grant as either criminal or civil jurisdiction. In contrast, section 1161 contains neither an express grant of jurisdiction to the State nor any definition of such jurisdiction as either civil, criminal or regulatory. See Bryan, 426 U.S. at 383-93.

It is helpful to contrast the phrase "shall have jurisdiction" of Pub. L. 280, with the phrase "laws of the State" of section 1161. The conclusion that "laws of the State" refers to state standards of conduct, and not to jurisdiction, is compelled. In enacting Pub. L. 280, Congress carefully and explicitly

differentiated between "jurisdiction" and substantive "laws" because it intended to incorporate state substantive law and state jurisdiction. See 18 U.S.C. § 1162(a) ("Each of the states . . . shall have jurisdiction over offenses . . . and the criminal laws of such state . . . shall have the same force and effect within . . . Indian country as . . . elsewhere . . . .")(emphasis added); 28 U.S.C. § 1360(a) ("Each of the states . . . shall have jurisdiction over civil causes of action . . . and those civil laws . . . of general application . . . shall have the same force and effect within . . . Indian country as . . . elsewhere . . . .")(emphasis added).

A close examination of Pub. L. 280 reveals, then, that when Congress has extended state jurisdiction over Indian country it has done so affirmatively by using precise language, not by oblique reference to state law.[13/] Accordingly, we find that Congress did

not grant licensing and distribution jurisdiction in section 1161 when it spoke with language that would have been inadequate to confer jurisdiction under Pub. L. 280. This distinction between substantive and regulatory law is at the heart of the Court's holding in Bryan. The Court found that although Congress ceded civil and criminal jurisdiction to the states through Pub. L. 280, it did not express an intent to grant the state regulatory jurisdiction to tax. Bryan, 426 U.S. at 379-93.

Perhaps the most compelling feature of section 1161's legislative history is the complete absence of any discussion concerning state licensing and distribution jurisdiction over liquor. In Bryan, the Supreme Court found the absence of legislative history fatal to the claim that Pub. L. 280 conferred upon the states regulatory jurisdiction to tax. Bryan, 426 U.S. at 380; see Kennerly v. District Court of Ninth Judicial Dist. of Mont.

400 U.S. 423, 426-27 (1971) (Congress consistently gives proposed extensions of state jurisdiction over reservation Indians "comprehensive and detailed . . . scrutiny"); Santa Rosa Band of Indians v. King's County, 532 F.2d 655, 661 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977).

The proposition that section 1161 incorporates only state substantive standards and not state licensing and distribution jurisdiction is also supported by comparing section 1161 with the Assimilative Crimes Act, 18 U.S.C. § 13 (1976), and the Major Crimes Act, 18 U.S.C. § 1153 (1976). Under the Assimilative Crimes Act, federal prosecutions of interracial offenses are effected by assimilating substantive state law to fill the gaps of federal law, but no state jurisdiction is involved.[14/] See United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979). The act provides:

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> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory or Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13 (1976) (emphasis added).

Under the Major Crimes Act, the federal courts have jurisdiction over certain offenses committed by Indians against Indians and non-Indians in Indian territory. The laws of the state in which the Indian country is situated are incorporated for the crimes of burglary and incest, as well as other state laws which have no federal counterparts. No state jurisdiction, however, is involved. See Youngbear v. Brewer, 549 F.2d 74, 75-76 (8th Cir. 1977). The act provides in part:

> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153 (1976) (emphasis added).

The Assimilative Crimes Act and the Major Crimes Act illuminate the function we believe Congress meant state law to perform in section 1161. Although both Crimes Acts require the incorporation of state law in adjudicating certain criminal offenses, this express requirement of incorporation clearly does not compel the incorporation as well of jurisdiction to enforce and administer those state laws.[15/] Rather than create a new body of federal criminal law, Congress decided

under these Acts to incorporate state substantive law. Federal courts, however, retain jurisdiction over the offenses. Nothing in section 1161 indicates that its language is to be differentiated substantively from that used in either of these Acts. Although the purpose behind incorporating substantive state law might vary among these statutes,[16/] Congress in enacting section 1161 appears to have adopted the convenient technique it had employed in drafting the Assimilative Crimes Act and the Major Crimes Act.

Having reviewed the relevant statutes and legislative history, we find no reason to depart from the view we expressed upon first reading the statute: section 1161 grants the states no jurisdiction to license or distribute liquor in Indian country. We next turn to the applicable precedents and administrative constructions.

C.

We have kept in mind the canons of construction, mentioned earlier in the opinion, to be applied to statutes affecting Indian immunities. Ambiguities are resolved in Bryan, supra. There, the Court held that although Pub. L. 280 conferred civil and criminal jurisidction to the states, it did not confer jurisdiction to tax.

The Court summarized its determination in Bryan by observing that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so." 426 U.S. at 390. Although this identical principle motivates our conclusion that section 1161 does not confer licensing and distribution jurisdiction upon the states, we are also persuaded by what Congress did express in section 1161 about regulatory authority. No tribal ordinance is effective

unless "certified by the Secretary of the Interior, and published in the Federal Register." 18 U.S.C. § 1161. Through this language, Congress indicated that the regulatory authority of the tribes which was the subject of § 1161 was safeguarded by federal supervision. We are therefore presented with a congressional scheme in which comprehensive tribal ordinances and Department of Interior certification procedures are "in themselves sufficient to show that Congress has taken . . . business . . . so fully in hand that no room remains for state laws imposing additional burdens. . . ." Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 691 (1965).

In United States v. New Mexico, 590 F.2d 323, 327-29 (10th Cir. 1978), cert. denied, 444 U. S. 832 (1979), the Tenth Circuit faced the issue we decide today: Whether section 1161 delegates to the states authority to regulate Indian country liquor

transactions. After tracing the Supreme Court's recent decisions, including Bryan, Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976), McClanahan v. Arizona State Tax Commission, supra, and Warren Trading Post, supra, the Tenth Circuit concluded that "Congress may delegate [regulatory] authority to the state, but when it does so it must be in specific terms. Section 1161 . . . does not delegate this authority either expressly or impliedly." 590 F.2d at 328.[17/]

We agree with the Tenth Circuit that the Supreme Court's recent precedents require a conclusion that section 1161 preempts[18/] state licensing and distribution jurisdiction in Indian country.

III

Although we have concluded that neither Washington nor California has regulatory jurisdiction to license liquor trans-

actions or distribute liquor in Indian country, the district court must determine in Muckleshoot and Tulalip whether Washington can impose a sales tax on Indian country liquor transactions. Because the Court below did not have available the Supreme Court's opinion in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, (1980) we reverse and remand for proceedings consistent with that opinion.

Although Washington concedes that, under Moe v. Salish & Kootenai Tribes, 425 U.S. at 475-481, it has no power to tax sales to tribal members, it argues that Colville permits state taxation of retail sales to non-tribal members, even though the class of non-tribal members includes Indians.

The district court apparently sought to avoid resolution of the state sales tax issue; nevertheless, it granted an injunction against further off-reservation state liquor seizures. Colville indicates, however, that

an injunction against state off-reservation seizures is improper without a determination that the state tax is invalid. Colville, 447 U.S. at 161-62. Two other issues were resolved in Colville. First, the Court found that state taxation of sales to non-tribal members, whether Indian or non-Indian, was neither preempted nor contrary to principles of tribal self-government. Colville, 447 U.S. at 154-59. Second, the Court held that a state's interest in enforcing its valid sales tax was sufficient to justify its seizure of cigarette shipments travelling to the reservation from out-of-state wholesalers if the tribes failed to comply with state collection procedures. Id. at 161-62. Consequently, although the court below did not directly address the tax issue, its grant of injunctive relief implicitly presumed the invalidity of the state sales tax. Because the district court did not conduct the inquiry mandated by Colville prior to granting the

injunction, we must reverse. Without an initial determination whether the sales tax is invalid, a grant of permanent injunctive relief is premature.

Beyond reversing the district court's grant of permanent injunctive relief, we are unable to intimate any opinion on the merits of the following questions: (1) whether Washington's sales tax on sales to non-tribal members, with or without credit given to tribal sales taxes, is preempted or violative of tribal self-government; or (2) whether Washington may impose recordkeeping requirements upon the tribes pursuant to the valid state taxing power, if any. Resolution of these and related questions will await full hearing on remand.

IV

Washington also contends that the twenty-first amendment to the United States Constitution enlarges its jurisdiction over reservation liquor transactions. That amend-

ment provides in part:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

There is little to commend the State's contention. See United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979), (summarily dismissing New Mexico's contention that the twenty-first amendment permits state liquor licensing on Indian reservations). As we have indicated, section 1161 does not expand a state's regulatory jurisdiction over tribal liquor sales in Indian country. Even if jurisdiction over reservation liquor transactions could be characterized as "concurrent", the Supreme Court has flatly held that neither "exclusive" nor "concurrent" jurisdiction federal enclaves are subject to state regulation by force of the twenty-first

amendment. United States v. State Tax Commission of Mississippi, 421 U.S. 599, 613-14 (1975).

The state's argument is also susceptible to a more fundamental criticism. Washington's Pub. L. 280 jurisdiction over the tribes is criminal and civil: Pub. L. 280 does not grant regulatory jurisdiction over the tribes. Bryan, 426 U.S. at 389. Even if the distinction between "concurrent" and "exclusive" jurisdiction were valid in this context, the state could not claim that its jurisdiction is concurrent because Pub. L. 280 is not a grant of regulatory jurisdiction to the states, and it is regulatory jurisdiction that is at issue in this case.

V

In Muckleshoot and Tulalip, Washington asserts that its counterclaims for injunctive relief and damages are not barred by the doctrine of tribal sovereign immunity

and argues that because its claim was compulsory, it needs no independent jurisdictional basis to sue the tribes. Washington also claims that jurisdiction for the counterclaim could be grounded on section 1161 and the twenty-first amendment. It further contends that the tribes waived their sovereign immunity by bringing an action for injunctive relief and that injunctive relief against a sovereign is not affirmative relief of the type barred by sovereign immunity when such relief is the logical concomitant of the court's power to issue declaratory relief. It is also suggested that the monetary relief Washington seeks can be justified on a similar basis. Finally, Washington argues that under Land v. Dollar, 330 U.S. 731 (1947), traditional concepts of sovereign immunity do not apply when the sovereign is in unlawful possession of another's property; because the tribes may be viewed as the constructive trustee for

Washington of all money received from the sale of liquor, traditional principles of sovereign immunity are inapplicable in this case.

The district court ruled in favor of the tribes on their motion for summary judgment. It did not, however, reach the issue of tribal sovereign immunity. Nevertheless, because the question of sovereign immunity is jurisdictional in nature we are obligated to resolve it irrespective of the merits of Washington's counterclaim. See People of the State of California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1154 (9th Cir. 1979).

The immunity of the tribes is coextensive with that of the United States. Neither can be sued without congressional or tribal consent and such consent must be unequivocally indicated. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978);

Quechan Tribe of Indians, 595 F.2d at 1155; Sekaquaptewa v. MacDonald, 591 F.2d 1289, 1291 (9th Cir. 1979); United States v. Oregon, 657 F.2d 1009, 1012-13 (9th Cir. 1981). Nothing on the face of section 1161 purports to subject the tribes to suits for declaratory or injunctive relief. See Martinez, 436 U.S. at 59-60. These principles also preclude counterclaims. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-13 (1940); United States v. City of Los Angeles, 595 F.2d 1386, 1389 (9th Cir. 1979). The present case does not fall within the Land v. Dollar exception to sovereign immunity, which is only activated when the claim is to property the sovereign wrongfully holds without any title. 330 U.S. at 737-738. The tribes are not agents or officers of the United States. We therefore find Washington's counterclaim barred by the doctrine of tribal sovereign immunity.[19/]

VI

In summary, we conclude that 18 U.S.C. § 1161 preempts state licensing and distribution jurisdiction over tribal liquor sales in Indian country. The effect of our holding in 77-2409 is that so long as Mrs. Rehner complies with the certified tribal ordinance authorized by 18 U.S.C. § 1161, she need not obtain a California license to sell liquor in Indian country. The judgment in 77-2409 is reversed.

In Muckleshoot and Tulalip, however, we must remand to the district court for a determination whether, and under what circumstances, Washington may impose a tax on tribal liquor sales to non-tribal members. We therefore reverse the district court's grant of injunctive relief to the tribes. We affirm, however, the trial court's conclusion that the twenty-first amendment does not expand the state's regulatory jurisdiction over reservation liquor transactions. We also

find that Washington's counterclaims are barred by the doctrine of tribal sovereign immunity. The judgments in 79-4403 and 79-4404 are affirmed in part and reversed in part and remanded for proceedings not inconsistent with this opinion.

FOOTNOTES

1/ 18 U.S.C. § 1161 Application of Indian Liquor Laws

> The provisions of sections 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.
>
> Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.

2/ Public Law 280 is the name commonly given to the Act of August 15, 1953, ch. 505, 67 Stat. 588.

3/ See Wash. Rev. Code Ann. § 37.12 (1962).

4/ The Muckleshoot ordinance provides:

> Tribally authorized liquor transactions shall comply with Washington State liquor law standards to the extent required by 18 U.S.C. 1161.

Muckleshoot Liquor Ordinance, § 7. 43 Fed. Reg. 26, 516 (1978).

The Tulalip ordinance provides:

> Nothing herein contained shall be construed to supercede the substantive laws of the State of Washington effective within the exterior boundaries of the Tulalip Indian Reservation and, where not inconsistent herewith, the substantive standards of the criminal laws of the State of Washington regarding sale, consumption and use of liquor shall apply.

Tulalip Ordinance No. 43, § 12, 42 Fed. Reg. 46, 612 (1977).

5/ Both the Muckleshoot and Tulalip reservations are within Indian country as defined in 18 U.S.C. § 1154 and 1161.

6/ Congress has manifested its intent to preempt this subject matter through a long sequence of statutes regulating Indian liquor transactions. In 1802, the President was authorized to prevent the sale or distribution of liquor among the Indian tribes. Act of March 30, 1802, § 21, 2 Stat. 139, 146. In 1832, Congress made the introduction or sale of liquor on the reservation a federal crime. Act of July 9, 1832, § 4, 4 Stat. 564. To aid in the enforcement of Indian liquor laws, Congress made possession of liquor in Indian country an independent federal offense in 1818, and subsequently has limited liquor in areas adjacent to reservations and within territory ordinarily considered to be outside Indian country. See Act of May 25, 1818, 40 Stat. 561 563; see generally F. Cohen, Handbook of Federal Indian Law 353 (1942). Congress has also prohibited distilleries in Indian country. 25 U.S.C. § 251 (1976). Until 1953, Congress continued its absolute prohibition on the introduction, possession and sale of liquor in Indian

6/ (cont.) country. See 18 U.S.C. §§ 1154, 1156 (1976). Although these prohibitions remain in effect, they are inapplicable to congressionally authorized liquor transactions in Indian country under 18 U.S.C. § 1161 (1976).

7/ The Indian commerce clause provides: "The Congress shall have power to regulate commerce . . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

8/ That provision provides in part: "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, providing two thirds of the Senators present concur . . . ." U.S. Const. Art. II, § 2, cl. 1.

9/ "Statutes are considered to be in pari materia - to pertain to the same subject matter - when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object." See J. Sutherland, supra, § 51.03 at 298. The Termination Acts, Pub. L. 280 and section 1161 are statutes regarding the applicability of state law in Indian country and must therefore be considered in pari materia and construed together. See Bryan, 426 U.S. at 389-390.

10/ In 1953, Congress adopted the goal of termination of the special relationship between the federal government and the Indian tribes. Over the following 15 years, the relationship with over 100 tribes was terminated.

11/ See, e.g., 25 U.S.C. § 726 (1976) ("[o]n and after the date of the proclamation to be issued in accordance with the provisions of section 722 of this title, all statutes of

11/ (cont.) the United States which affect Indians because of their status as Indians shall no longer be applicable to the Alabama and Coushatta Tribes of Texas or the members thereof, except as provided in said section and the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction") (emphasis added); see also language identical to that emphasized here in 25 U.S.C. §§ 757 (a) and 899.

12/ At trial, Washington argued that Pub. L. 280 conferred licensing and distribution jurisdiction to the state. Washington has apparently abandoned the issue on appeal. See Bryan, 426 U.S. at 390-93 (Pub. L. 280 does not confer regulatory jurisdiction upon the States).

13/ See Bryan, 426 U.S. at 383-93 (Court refuses to read Pub. L. 280 as a grant of regulatory jurisdiction to the states because Congress did not expressly extend "regulatory" as opposed to "criminal" or "civil" jurisdiction).

14/ 18 U.S.C. § 1152 makes the Assimilative Crimes Act applicable to crimes committed by non-Indians against Indians and non-major crimes of Indians against non-Indians.

15/ Although Washington failed to raise the issue at trial, it argues on appeal that its liquor monopoly is itself a substantive standard of conduct designed to discourage liquor consumption. Because the issue is primarily one of fact, we refuse to entertain it for the first time on appeal. See Sgro v. United States, 609 F.2d 1259, 1264 n.8 (7th Cir. 1979); Seymour v. Coughlin Co., 609 F.2d 346, 348-49 (9th Cir. 1979), cert. denied 446 U.S.

15/ (cont.) 957 (1980). In any event, section 1161 would not countenance such a circuitous scheme. Under section 1161, the states are free to legislate restrictions on Indian country liquor transactions directly by promulgating substantive restrictions. Extension of state licensing and distribution jurisdiction would be unnecessary to effect these restrictions.

16/ Incorporation of state law under section 13 and section 1153 was a convenient method of filling the gaps in federal law. See generally D. Getches, D. Rosenfelt and C. Wilkinson, Federal Indian Law 370, 375 (1979). A more substantive concern may have motivated Congress to adopt the same method in section 1161: An intent to ensure that dry States would be able to remain dry by entirely "restricting" liquor sales within and without Indian country. See S. Rep. No. 722, 83rd Cong., 1st Sess. reprinted in [1953] U.S. Code Cong. & Ad. News 2399-2400. Consistent with sections 13 and 1153, however, this possible purpose behind incorporating state law under section 1161 - to allow states to "restrict" Indian and non-Indian liquor sales - could be achieved by merely incorporating state standards. There would hardly be a need to extend state licensing and distribution jurisdiction over Indian country liquor transactions if such traffic was proscribed by the state law.

17/ Although New Mexico, unlike Washington, is not a Pub. L. 280 state, no distinction relevant to this case can be derived from that difference since only regulatory jurisdiction is implicated in this appeal. See Bryan, 426 U.S. at 383-393 (Congress did not confer regulatory jurisdiction on the states through Pub. L. 280). As we have indicated, the legislative history of Pub. L. 280 demonstrates that Congress contemplated extending

17/ (cont.) liquor jurisdiction to the states under Pub. L. 280 but rejected the provision that would have done so. See discussion at pp. 18-20, supra.

18/ A state's exercise of jurisdiction over reservation Indians is invalid not only if it conflicts with federal preemption but also if it infringes on Indian self-government. These are independent (although related) barriers to state authority. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980). In view of our determination that section 1161 has preemptive effect, and because neither Washington nor the tribes have directly addressed the question whether state licensing or distribution jurisdiction infringes on tribal self-government, we do not reach the infringement issue.

19/ We further reject Washington's contention that, by suing for injunctive relief, the tribes waived their sovereign immunity and consented to suit. In United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), we held that an Indian tribe had manifested its consent to suit by intervening as a party plaintiff in a suit by the United States against Oregon to establish the fishing rights of all Indian tribes occupying the Columbia River basin. The Indian tribe voluntarily intervened in the original action, which resembled an equitable action in rem, to establish and to protect its treaty fishing rights. In this posture the court necessarily had authority to issue orders directed to the tribes, so that it could retain control over the subject litigation. The tribes' suit here does not manifest such broad, voluntary consent. The Muckleshoot and Tulalip tribes were forced to seek injunctive relief in court after Washington had seized liquor bound for the reservations. This cannot

19/ (cont.) constitute a waiver of the tribes' sovereign immunity against counter-claims for injunctive or monetary relief. A state cannot compel a waiver of tribal sovereign immunity simply by seizing goods owned by the tribes.

Rehner v. Rice, No. 77-2409
Muckleshoot Indian Tribe v. State of Washington - No. 79-4403 Tulalip Tribe of Washington v. State of Washington - No. 79-4404

GOODWIN, Circuit Judge, dissenting

The result reached by the majority appears to be equitable. It evidences a scholarly approach to some complex issues of divided sovereignty, but the decision seems not to be consistent with either the text of the relevant law or legislative history.

When the Twenty-First Amendment repealed the federal criminal penalties for the sale of liquor the amendment took care to protect the regulatory interests of the several states. United States Constitution, Amendment XXI, section 2 (1933). Some states chose to remain "dry."

All Indian country remained dry by federal law; and for the next twenty years it remained a crime for anyone to sell liquor in Indian country. See 18 U.S.C. § 1154.

When Congress, in 1953, conditionally

lifted the criminal penalties which had been imposed upon the liquor traffic among Indians it gave Indians some kind of parity with the nation's citizens who are not Indians. Congress indicated no intent to give Indians greater rights than other citizens enjoy with regard to liquor.

Congress took care to lift the criminal penalty only so long as the newly legalized "transactions" would be in conformity with all state laws. 18 U.S.C. § 1161. All the discussion in the majority opinion about "conferring" or "not conferring" jurisdiction upon the states is interesting but seems unresponsive to the purpose of the statute.

The statutory language is the most troublesome in four states within this circuit: Washington, Oregon, Idaho, and Montana, so-called monopoly states. Washington since 1933 has made contraband all liquor that is not in conformity with

RCWA 66.32.010.[1/]

Under the majority decision, Indians whose reservations lie within the boundaries of the State of Washington will have the status of super citizens. They, and they alone, can buy and import at free market prices any liquor they desire. All other citizens of the State of Washington who desire to purchase liquor must join the queue at the government store and select from a monopoly inventory at a monopoly price. Washington shares with Oregon some of the nation's highest retail liquor prices. (Alaska enjoys the highest prices.) Washington has a special 51 percent state sales tax on liquor sold in state stores. Other monopoly states simply take their monopoly profit in lieu of taxes. The Distilled Spirits Council of the Unites States publishes periodic price information for the trade. According to the Council's report for the last half of 1981, a popular blended

American whiskey which sells for an average retail price of $5.50 per ml. in Arkansas and $6.25 in California sells for $7.20 in Washington.[2/] I doubt that Congress intended by § 1161 to pave the way for one favored group of citizens to break the state monopolies that are so cherished by money hungry legislatures.

On the merits, this policy may be an idea whose time has come, but I would leave its implementation to the legislative branch. I would affirm No. 77-2409 and vacate No. 79-4403 and No. 79-4404.

1/ RCWA 66.32.010:

"Except as permitted by the board, no liquor shall be kept or had by any person within this state unless the package in which the liquor was contained had, while containing that liquor, been sealed with the official seal adopted by the board, except in the case of:

(1) Liquor imported by the board; or

(2) Liquor manufactured in the state for sale to the board or for export; or

(3) Beer, purchased in accordance with the provisions of law; or

(4) Wine or beer exempted in RCW 66.12.010.

2/ Distilled Spirits Council of the United States, Incorporation, Economics and Statistics Division, December 17, 1981.

APPENDIX B

UNITED STATES CODE, TITLE 18

§ 1154:

"(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any names, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor or any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

"(b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or

intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attache, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

"(c) The term °Indian country° as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 27. 63 Stat. 94."

ORIGINAL
Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

V.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 31, 1982.
CERTIORARI GRANTED NOVEMBER 1, 1982.

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOCKET ENTRIES

Eva Rehner v. Baxter Rice
Civil No. 77-0109-N

Date	NR.	Proceedings
2-10-77	1	Fld comptl for declaratory judgment, mandatory injunction & Prelim, injunction. JS-2
		* * * * * * * * * *
2-23-77	3	Fld deft acknowledgment & admission of serv of summons & complt on 2-16-77.
3-7-77	4	Fld deft notice of mot & mot to dismiss or in alternative mot for S/J & P/A in support set 3-21-77 @ 10:30am t/w affid of serv.
3-10-77	5	Fld pltfs memo of P/A in Oppo to defts mot to dismiss t/w affid of serv.

* * * * * * * * * *

3-21-77	8	Fld pltf First Amended Complt for declaratory judgment, mandatory injunction & preliminary injunction. t/w affid of serv.
3-21-77	9	Ent ord hrg mot to dismiss or in alternative for S/J; mot to dismiss Granted w/o leave to amend deft to prepare order. (N)

* * * * * * * * * *

5-11-77	12	Fld deft judgment that complt for declaratory judgment, Mandatory Injunction & Prelim Injunction is dismissed. (N) (Ent 5-11-77) JS-6 mld cys.
5-18-77	13	Fld pltf Second Amended Findings of Fact & Conclusion of Law. (N)

5-23-77	14	Fld pltf notice of mot & mot to vacate judgment or in alternative mot for rehearing & reconsideration of mot to dismiss for failure to claim set for 7-11-77 @ 10:30 am. t/w P/A in suppt & affid of serv.
6-10-77	15	Fld pltfs Notice of Appeal from judgment ent. 5-11-77.
6-23-77	16	Fld Pltfs designation of record on appeal.
		* * * * * * * * * *
7-6-77	18	Fld Defts opposition to first amended motion to vacate judgment or, in the alternative, motion for rehearing and reconsideration of motion to dismiss for failure to state a claim, or, in the

alternative, motion to alter or amend judgment, and points and authorities in support thereof.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVA REHNER, Plaintiff, v. BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California, Defendant.	No. 77-0109-N FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, MANDATORY INJUNCTION, and PRELIMINARY INJUNCTION

NATURE OF THE CASE

1. By this action an individual Indian residing on the Pala Indian Reservation in San Diego County, California seeks

a declaration by this Court that she need not comply with the licensing requirements of the California Alcoholic Beverage Control Act (Bus. & Prof. Code §23000 et seq.) in order to sell distilled spirits at her general store on the Pala Indian Reservation. To effectuate this declaration, she also seeks the appropriate injunctive relief.

JURISDICTION

2. This action arises under the following federal statutes: 18 U.S.C. §§1154, 1156, 1161, and 1162, 28 U.S.C. §1360, and 42 U.S.C. §1983; the following federal regulation: 25 C.F.R. §251; the Supremacy Clause of the United States Constitution (Article VI, Paragraph 2); and the Indian Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

3. This Court has jurisdiction of this matter under 28 U.S.C. §1331, 1337, 1343, 2201, and 2202; and 42 U.S.C. §1983.

4. The value of the amount in controversy herein exceeds the sum of $10,000, exclusive of interest and costs, in that the value to plaintiff of her business, the sole source of employment and support for herself and her husband, is more than $10,000. Also, the current price on the open market of a general off-sale license, issued by the California Department of Alcoholic Beverage Control, to engage in the sale of distilled spirits is approximately $55,000.

PARTIES

5. Mrs. Eva Rehner, a federally licensed Indian trader, is a member of the Pala Band of Mission Indians. She is the owner and operator of a general store on the Pala Reservation in San Diego County,

California and resides on said reservation in said county.

6. Mr. Baxter Rice is the Director of the Department of Alcoholic Beverage Control of the State of California. The purpose of this department is to provide a governmental organization to insure the uniform administration and enforcement of the liquor laws of California pursuant to the Alcoholic Beverage Control Act, Bus. & Prof. Code §23000 et seq.

GENERAL ALLEGATIONS

7. Mrs. Eva Rehner wishes to sell distilled spirits at her store on the Pala Indian Reservation in San Diego County. She has been informed by the Defendant, Mr. Baxter Rice, through his employee, Mr. Leslie L. Case, that the Department of Alcoholic Beverage Control will require Mrs. Rehner to obtain an off-sale general

license from the Defendant in order to sell distilled spirits at her store.

8. Mrs. Eva Rehner is indigent and cannot afford such a license. On the open market, such licenses are currently being sold for approximately $55,000 each. At certain intervals, the California Department of Alcoholic Beverage Control has issued such licenses for a lesser sum, but those licenses were issued by a lottery system only to those few persons fortunate enough to have their names drawn at random in the lottery.

9. The Defendant, Mr. Baxter Rice, has no power and lacks jurisdiction to require Mrs. Rehner to obtain such a license to engage in the sale of distilled spirits at her store on the Pala Indian Reservation in San Diego County, California.

10. A genuine and actual controversy exists between Mrs. Rehner and

the Defendant, Mr. Baxter Rice, concerning whether the Defendant may require Mrs. Rehner to obtain a general off-sale license from Defendant in order to engage in the sale of distilled spirits at her store on the Pala Indian Reservation in San Diego County, California, in that Mrs. Rehner, through her attorneys, has requested Defendant to exempt her from the operation of the California Alcoholic Beverage Control Act (Bus. & Prof. Code §23000, et seq.), which purports to require all persons, including an Indian who is a licensed Indian trader on an Indian Reservation, to obtain such a license, and that Defendant, through his employee and agent Mr. Case, has refused to grant her an exemption.

11. Plaintiff, Eva Rehner, is informed and believes and on such information alleges that the Defendant, his

employees, successors in office, agents, subordinates and representatives in the Department of Alcoholic Beverage Control have prepared an do maintain a list of all persons and/or establishments in California, or specified parts thereof, to whom or to which wholesalers of distilled spirits may lawfully sell supplies of such distilled spirits. The name of Eva Rehner does not appear on said list.

12. Because of increasing local competition, Mrs. Rehner's business has been and is being irreparably and immediately injured and will continue to suffer great and irreparable economic detriment unless Mrs. Rehner may engage in the sale of distilled spirits at her store on the Pala Indian Reservation without obtaining such a license or other evidence of compliance with the California Alcoholic Beverage Control Act.

WHEREFORE, Mrs. Eva Rehner prays for the following relief:

1. That the Court declare that Mrs. Rehner may engage in the sale of distilled spirits at her store on the Pala Indian Reservation without obtaining a license or other evidence of compliance with the California Alcoholic Beverage Control Act (Bus. & Prof. Code §23000 et seq.) from the Defendant. Also, that the Court declare Mrs. Rehner may purchase supplies of distilled spirits for sale at her store on the Pala Indian Reservation from wholesalers of such merchandise without displaying or otherwise providing such a license or other evidence of such compliance, and that wholesalers of distilled spirits may sell such merchandise to Mrs. Rehner for sale at her sotre on the Pala Indian Reservation without requiring her to exhibit or display to them any

license or other evidence of her compliance with the California Alcoholic Beverage Control Act (Bus. & Prof. Code §23000 et seq.) issued by Defendant.

2. That the Court issue a permanent mandatory injunction ordering and directing that the Defendant, his employees, successors in office, agents, subordinates, and representatives place the name of Eva Rehner on whatever list or lists or other document or other documents which he and/or they have maintained and/or do maintain listing the names or other identifying identifying designations of these persons and/or establishments in California, or specified portions thereof, which or who may lawfully purchase supplies of distilled spirits from wholesalers for resale at retail to the public or portions thereof in California.

3. That Defendant, Baxter Rice, his employees, successors in office, agents, subordinates, and representatives be preliminarily enjoined from requiring the plaintiff, Eva Rehner from obtaining a California off-sale general license or any other evidence of her compliance with the California Alcoholic Beverage Control Act (Bus. & Prof. Code §23000 et seq.) in order to sell distilled spirits at her store on the Pala Indian Reservation or to purchase such distilled spirits from wholesalers for sale by her at her store on the Pala Indian Reservation.

DATED: March 21, 1977.

Respectfully submitted,

CALIFORNIA INDIAN LEGAL SERVICES

By /s/ PAMELA L. ALDRIDGE
PAMELA L. ALDRIDGE
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

ACKNOWLEDGEMENT AND ADMISSION OF SERVICE OF SUMMONS AND COMPLAINT

I, BAXTER RICE, the Director of the Department of Alcoholic Beverage Control of the State of California, the defendant in the above entitled action, hereby acknowledge and admit that service of the summons and complaint in this action was made upon me at my place of business at 1215 "O" Street, Room A-443, Sacramento, California, 95814, by delivery to me of a copy of the summons and complaint through the United States mail on February 16, 1977.

Dated: February 16, 1977

/s/ C. E. CAMERON, JR., CHIEF
COUNSEL DEPARTMENT OF
ALCOHOLIC BEVERAGE CONROL
BAXTER RICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

NOTICE OF MOTION AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO: EVA REHNER, PLAINTIFF HEREIN, AND HER ATTORNEY ART BUNCE, ESQ.

PLEASE TAKE NOTICE, that on Monday, March 21, 1977, at 10:30 A.M., or as soon thereafter as counsel may be heard in the above-entitled court, in the Courtroom of the Honorable Leland C. Nielsen, United States District Judge, at the United States District Courthouse, located at 940 Front Street, San Diego, California, defendant Baxter Rice, Director, Department of Alcoholic Beverage Control, State of California, will move said Court as Court as follows:

To dismiss the action as to this moving defendant because the Complaint

fails to state a claim against said defendant upon which relief can be granted, and because this moving defendant is entitled to a judgment as a matter of law.

This motion will be made and based upon this Notice of Motion, and Motion, the Points and Authorities attached hereto, the accompanying exhibits, and all files, records, and pleadings in the above-entitled matter.

DATED: March 3, 1977

EVELLE J. YOUNGER,
Attorney General

By/s/WILLIAM R. WINSHIP
WILLIAM R. WINSHIP, JR.
Deputy Attorney General

Attorneys for Defendant

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVA REHNER, Plaintiff, vs. BAXTER RICE, individually and as Director of the Department of Alcoholic Beverage Control of the State of California, Defendant.	Civil Case No. 77-0109-N JUDGMENT

Defendant's motion to dismiss in the above matter having come on for hearing on March 21, 1977, before the Honorable Leland C. Nielsen, Judge Presiding of the above entitled Court, plaintiff appearing

by her counsel, Pamela L. Aldridge, Esq., defendant appearing by its counsel, Evelle J. Younger, Attorney General of the State of California by William R. Winship, Jr., Deputy Attorney General, the Court having read all the papers on file in the action, the matter having been orally argued and submitted, the Court having given notice to all parties of its intended decision at the time of the aforementioned hearing and written findings of fact and conclusions of law having been filed with the Court and the Court being fully informed in the action, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The Complaint for Declaratory Judgment, Mandatory Injunction and

Preliminary Injunction is dismissed.

DATED: 5-10-77

/s/LELAND C. NIELSON
LELAND C. NIELSEN, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVA REHNER, Plaintiff, vs. BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California, Defendant.	Civil Case No. 77-0109-N SECOND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

JURISDICTIONAL FACTS

1. Plaintiff, a federally licensed Indian trader, is a member of the

Pala Band of Mission Indians. Plaintiff is the owner and operator of a general store on the Pala Indian Reservation, a federal Indian reservation, located in San Diego County, California.

2. Defendant is the Director of the Department of Alcoholic Beverage Control of the State of California.

3. Plaintiff desires to sell distilled spirits at her general store on the Pala Indian Reservation without first obtaining a general license to do so from defendant.

4. Defendant has refused plantiff's request to sell distilled spirits at her general store on the Pala Indian Reservation unless and until plaintiff obtains a general license from defendant to do so. (California Business and Professions Code sections 23000 et seq.).

6. By her lawsuit, plaintiff contends defendant has no power and lacks jurisdiction to require plaintiff to obtain a general license to engage in the sale of distilled spirits at her general store located on the Pala Indian Reservation.

II

CONCLUSION OF LAW

1. Generally, the sale of alcoholic beverages upon a federal Indian reservation is a violation of law (Title 18, U.S.C.A. section 1154).

2. However, an exception to the general prohibition against the sale of alcoholic beverages upon a federal Indian reservation exists where a tribe, having jurisdiction over such area, duly adopts an ordinance providing the sales of alcoholic beverages will conform with the laws of the state in which the sales of alcoholic beverages occur. Such ordinance must be

certified by the Secretary of the Interior and published in the Federal Register. (Title 18, U.S.C.A. section 1161).

3. On or about August 13, 1959, the Pala Band of Mission Indians, the tribe having jurisdiction over the Pala Indian Reservation located in San Diego County, adopted an ordinance providing that the introduction, sale or possession of intoxicating beverages shall be lawful within the Indian country therein, provided that such introduction, sale or possession "is in conformity with the laws of California."

4. On or about April 11, 1960, the above ordinance adopted by the Pala Band of Mission Indians, was certified by the Secretary of Interior.

5. On or about April 16, 1960, the above ordinance, adopted by the Pala Band of Mission Indians, was published in

the Federal Register in accordance with Title 18, U.S.C.A. section 1161.

6. Accordingly, plaintiff may not engage in the sale of distilled spirits at her general store located on the Pala Indian Reservation without first obtaining a general license to do so from defendant in accordance with the laws of the State of California relating to the sale of alcoholic beverages. (California Business and Professions Code sections 23000 et seq.).

Dated: 5-17-77

/s/LELAND C. NIELSEN
LeLand C. Nielsen, Judge
United States District Court
Southern District of California

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

NOTICE OF MOTION

TO: BAXTER RICE, DEFENDANT HEREIN, AND HIS ATTORNEY WILLIAM WINSHIP, ESQ.

PLEASE TAKE NOTICE, that on Monday, July 11, 1977, at 10:30 A.M., or as soon thereafter as counsel may be heard in the above-entitled court, in the Courtroom of the Honorable Leland C. Nielsen, United States District Judge, at the United States District Courthouse, located at 940 Front Street, San Diego, California, Plaintiff, EVA REHNER, will move this Court as follows:

To vacate its Judgment of May 11, 1977 dismissing Plaintiff's Complaint for Declaratory Relief, Mandatory Injunction and Preliminary Injunction or, in the alternative, will move to rehear and

reconsider defendant's motion to dismiss Plaintiff's Complaint for failure to state a claim.

This motion will be made and based upon this Notice of Motion, and Motion, the Points and Authorities attached hereto, and all pleadings and documents filed in the above-entitled matter, and upon such oral or documentary evidence as may be presented at the hearing of the motion.

Dated: May 23, 1977

/s/PAMELA L. ALDRIDGE
Pamela L. Aldridge
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVA REHNER, Plaintiff,	)	Civil No. 77-109-N
v.	)	O R D E R
BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California, Defendant.	)	

On September 12, 1977, plaintiff brought a motion to vacate judgment or in the alternative for rehearing of defendant's motion to dismiss. Defendant's motion to dismiss was previously granted by this Court on May 11, 1977. Plaintiff was represented by Art Bunce, Esquire, of California Indian Legal Services, and Defendant was represented by William Winship, Esquire, Deputy Attorney General for the State of California.

The Court, having considered the briefs and arguments of counsel, and having been advised in the premises, hereby determines that plaintiff's motion to vacate or to reconsider is DENIED.

IT IS SO ORDERED.

Dated: January 16, 1978.

/s/ LELAND C. NIELSEN
LELAND C. NIELSEN,
United States District Judge

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAXTER RICE, Individually
and as Director of the Department
of Alcoholic Beverage Control
of the State of California

Petitioner,

v.

EVA REHNER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Respondent Rehner is dissatisfied with petitioner's statement of the question presented, in particular the assumption or representation that the states were given "express powers ... under the Twenty-First Amendment to regulate ... alcoholic beverages in Indian Country within their boundaries." California's Petition for Certiorari [hereafter "PC"] pp. 2-3. Since it is settled that the twenty-first amendment does not extend the states' jurisdiction over federal lands (Section III (B), infra), and since Indian reservations are federal lands traditionally beyond the regulatory jurisdiction of the states, this case involves only questions of statutory, not Constitutional, interpretation. As the Ninth Circuit held in ruling against Washington's twenty-first amendment claims in the consolidated cases, "it is regulatory jurisdiction that is at issue in this case."

Rehner at 135. There is no need to decide Constitutional issues of a state's power under the twenty-first amendment to resolve this case; the amendment serves at most as a backdrop against which to consider Congress' intent in passing 18 U.S.C. § 1161. In addition, petitioner [hereafter "California" or "State"] never raised twenty-first amendment issues in either its district court or Ninth Circuit pleadings. See Section III (A), infra.

Since it is well-established that Congress retains jurisdiction over Indian reservations except to the degree that it is expressly delegated to the states, (Section III (B), infra) the true issue is whether Congress delegated reservation liquor licensing powers to the states by means of § 1161, not whether that statute deprived the state of an existing power.

Respondent would frame the question before this Court as it was presented by

California to the district court and the Ninth Circuit: Whether under 18 U.S.C. § 1161 the states have licensing and distribution jurisdiction over Indian country liquor transactions. cf. Rehner at 1341-2.

PARTIES TO THE CASE

The only parties to this case are petitioner Rice and respondent Rehner. However, this case was consolidated for argument and decision with two cases from the State of Washington, Muckleshoot Indian Tribe v. Washington (Ninth Circuit No. 79-4403) and Tulalip Tribe v. Washington (Ninth Circuit No. 79-4404). The Ninth Circuit, sitting en banc, reversed the District Court in this case, but remanded the two Washington cases for further proceedings due to factors in the Washington cases not present in this one.

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OPINION BELOW

The Ninth Circuit's decision is reported at 678 F.2d 1340 (9th Cir. 1982) [hereafter "Rehner" or "Ninth Circuit decision"].

STATUTORY PROVISIONS INVOLVED

As pointed out above and in Section III (A), infra, California has not previously advanced any twenty-first amendment arguments. Respondent urges this Court to decline California's invitation to decide an unnecessary Constitutional issue. The only law directly involved in this case is 18 U.S.C. § 1161.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case supplied by petitioner, but wishes to further explain the complex procedural history of this case.

After the district court entered its Judgment of May 11, 1977, respondent (plaintiff below) moved to vacate the judgment or to rehear the motion to dis-

miss. After extensive briefing, that motion was denied on January 17, 1978.

The case was originally argued before the Ninth Circuit on April 3, 1979, before Judges Goodwin, Gray and Hufstedler. Judge Hufstedler resigned before decision, and the panel was reconstituted to include Judge Sneed by order of January 4, 1980. Decision was deferred by the Ninth Circuit pending this Court's decision in another case. Supplemental briefs were requested by order of June 12, 1980. On November 10, 1981, the Ninth Circuit ordered rehearing by an en banc panel. Its decision was rendered on June 8, 1982.

SUMMARY OF ARGUMENT

In response to the Ninth Circuit's decision, the California Legislature enacted Senate Bill 1888, authorizing California liquor wholesalers to sell to non-state-licensed retail liquor establishments on Indian reservations and in

Indian Country. Because of California's implicit acquiescence in the Ninth Circuit's decision, Supreme Court review is unnecessary and inappropriate.

The Ninth and Tenth Circuit courts of appeal, the only ones to consider the question, have both held that states may not impose their liquor licensing requirements on Indian reservations. No conflict of appellate authority exists that requires Supreme Court resolution.

Twenty-first amendment issues were not raised by California below, so they are not properly before this Court. In any event, those arguments are unpersuasive, having been unsuccessfully urged in the Tenth Circuit and in the other consolidated cases in the Ninth Circuit. The twenty-first amendment did not enlarge the states' jurisdiction, only their power to deal with liquor within their existing jurisdiction. In addition, any extension of state liquor licensing

authority onto Indian reservations would conflict with pre-empting Federal laws and policies, and a balancing of interests would still defeat California's claimed licensing power. Since Congress has not expressly granted reservation liquor licensing power to California, the Ninth Circuit's holding that no such power exists is correct and should be allowed to stand.

ARGUMENT AGAINST GRANTING THE WRIT

I. California Has Subsequently Enacted Legislation Recognizing Its Lack of Authority to License Reservation Liquor Transactions

Shortly after the Ninth Circuit decision, a pending bill in the California Legislature (SB 1888) was amended to add persons doing business in Indian country to the list of non-licensees to whom li-

quor wholesalers can legally sell.[1] The bill passed, and was signed by Governor Brown on September 13, 1982 as Chapter 906 of the Legislature's 1982 session, after the state's petition for certiorari was filed. It will take effect on January 1, 1983, amending Business and Professions Code § 23384.[2]

The legislative committee report on the bill is included herewith as Appendix A. It states that the bill is "in response to the recent court decision in Eva Reiner v. ABC" (sic), and notes that "premises on lands owned by Indians need not

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[1]The other areas exempted are military bases, national parks, and certain veterans homes. Cal. Business & Professions Code § 23384.

[2]Respondent has not yet been able to secure a copy of the chaptered bill, but will file a supplemental exhibit or brief under Rule 22(G) when a copy is available, if the Court so desires.

be licensed by the ABC." (California's Department of Alcoholic Beverage Control). It is thus clear beyond argument that the California Legislature, in considering the bill, knew of and accepted the Rehner decision, and amended California's laws appropriately.

The bill's impetus came from the liquor wholesalers' association, which was concerned about its members' legal ability to sell to unlicensed reservation dealers. See Appendix A. In light of the Ninth Circuit decision, it was not necessary to insert specific language exempting reservation sellers from state licensure, and no express provision to that effect appeared in the legislation.

Granting wholesalers the right to sell to unlicensed reservation liquor outlets clearly shows the California Legislature's acquiescence in the Rehner decision, since otherwise the act would be a nullity. If California could require res-

ervation sellers to obtain state liquor licenses, there would be no legitimate nonlicensees on the reservations to sell to. Of course, the Legislature could not have intended to authorize wholesalers to sell to illegal businesses; that would make no sense. The only logical conclusion is that the California Legislature acquiesced in the Rehner decision.

The bill did not differentiate between Indian and non- Indian reservation sellers, in line with the Ninth Circuit's conclusion that tribes have the exclusive power to license both Indians and non-Indians selling liquor on their reservations. Rehner at 1342, 1348. Although petitioner fails to recognize that lack of distinction in its arguments on Indian sales to non-Indians and non-Indian licensees, PC at 16-17, the amended statute is clear: a wholesaler may sell to any reservation nonlicensee. It is up to the tribe and the Federal government to li-

cense and regulate the reservation sellers, in accordance with § 1161, tribal ordinances, and other applicable laws. Thus, the only issue that was decided by the Ninth Circuit--California's power to require Mrs. Rehner to obtain a state liquor license--has been disposed of by the enactment of SB 1888.

This Court has often recognized that subsequent legislation can effectively settle all or many of the issues in a controversy. See, e.g., Kremens v. Bartley, 431 U.S. 119 (1977); United States v. New Jersey State Lottery Commission, 420 U.S. 371 (1975). Johnson v. Mississippi, 586 F.2d 387 (5th Cir. 1978), observed in a similar situation:

> After this appeal was filed, the Mississippi Legislature responded to the decision of the District Court by amending the statute .... This legislative action eliminated the unconstitutionality .... That being so, we are no longer presented with a live case or controversy.

Id. at 388.

A similar result was reached when Congress by statute gave a "clear directive" that settled a question of interpretation of an existing statute. Navajo Tribe v. Andrus, 644 F.2d 790, 791 (9th Cir. 1981). Once the Legislature speaks existing legal controversies must be reexamined to see whether actual disputes still exist.

Since the statute was amended after the Ninth Circuit's mandate was filed with the district court on August 2, 1982, the Rehner decision was certainly not "mooted" in a technical sense. At the time of the decision, there was an unquestionably live controversy that required resolution. A court should not "vacate its judgment when the rule it has reviewed is modified to conform to that judgment." Finberg v. Sullivan, 658 F.2d 93, 100 (3rd Cir. 1981). However, such subsequent modification is certainly an important consideration in granting or

denying certiorari. Since the legislation deals only with wholesalers, it would apparently still be a violation of state law to sell liquor on Indian reservations without a state license, if not for the Ninth Circuit's decision. Thus, the legislation does not moot the underlying controversy in a technical sense. However, it certainly makes it clear that California no longer asserts its liquor licensing power on Indian reservations. For that reason alone, the writ should be denied.

II. None Of The Usual Criteria for Granting Certiorari Apply to This Case

This Court normally accepts cases only to resolve conflicts between different courts or to decide nationally important questions of law. Supreme Court Rule 17.1. California's Constitutional claims under the twenty-first amendment are discussed in Section III, infra. None of the other Rule 17 considerations can even

arguably be applied here.

It has been the general policy of this Court to decline review of decisions not involving a conflict between the lower courts and/or an important federal question. Supreme Court Rule 17.1; Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923). The Rehner decision does not conflict with any other Court of Appeal decisions. To the contrary, the Tenth Circuit reached the same conclusion in United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978) cert. denied, 444 U.S. 832 (1979), finding in favor of exclusive tribal licensing of liquor sales within Indian Country. Thus, a harmony of opinion presently exists between the only two federal appeals courts which have squarely addressed the issue at hand, both of which concluded that § 1161 did not extend the states' licensing authority.

Supreme Court review of this decision is thus unnecessary, and could only serve to disrupt an already functioning system of tribal liquor licensing, particularly in the Tenth Circuit where the New Mexico decision has been in effect for approximately four years. Also, as previously noted, in the Ninth Circuit California's legislation allowing liquor wholesalers to sell to non-licensed persons within Indian country will soon take effect. Accepting this case for review would create an apparent judicial/legislative conflict, causing great confusion.

The Ninth Circuit held that § 1161, while incorporating state substantive standards, did not confer reservation liquor licensing jurisdiction on the state. California attempts to create a definitional issue over what constitutes "substantive standards." No such problems are raised in this simple licensing case, nor have any practical problems yet arisen,

making their resolution premature. Should clarification become necessary at some future point, this is obviously a task best left to the district court; that court will have the benefit of the presentation of evidence and access to the full record to enable it to make such fine determinations.

California states that further interpretation and review of § 1161 is necessary because the reservation licensing was not addressed in United States v. Mazurie, 419 U.S. 544 (1975), inferring that this Court left open the issue for later determination. The Court in Mazurie nowhere gives any such indication. In fact, the court in U.S. v. New Mexico, supra, found that Mazurie "virtually decides the present question." Id. at 326. California does not explain why, if this Court wished to address the reservation licensing issue, it chose to deny certiorari in the New Mexico case. 444 U.S.

at 832. This Court, having once already declined to complete the "task of interpreting Section 1161," (PC 25), need not do so now.

California also argues that review of this case is necessary to address possible problems of enforcement of 18 U.S.C. § 1154. At the same time, California acknowledges that 18 U.S.C. § 1161 renders § 1154 inapplicable, provided the provisions of § 1161 are followed. Respondent is unaware of any contemplated, threatened, or actual prosecutions under § 1154. Again, California merely raises a hypothetical problem where none now exists. For the Court to address this issue without an actual controversy before it would be premature and unnecessary. Barker Painting Co. v. Local 734, Brotherhood of Painters, 281 U.S. 462 (1930). This issue need not be dealt with by the Court at this juncture.

The issue in this case is narrow: whether Indian tribes have the exclusive right to issue a license for retail sales of liquor within the boundaries of an Indian reservation. California argues, however, that widespread negative consequences will result if the Ninth Circuit's decision in favor of tribal jurisdiction is allowed to stand. It alleges that if the state loses the capacity to license Indian liquor retailers on the reservation, the state will also lose control over sales and distribution of liquor generally. PC 11. There is no basis for this conclusion. As discussed in Section III (C), supra, the Ninth Circuit's decision creates no jurisdictional bar to the continued enforcement of state criminal sanctions on Indian reservations. See Bryan v. Itasca County, 426 U.S. 373, 383-393 (1976). The application of the state penal code in the area of liquor sales or consumption is not dependent on

licensing per se. Except for the fact that the tribe rather than the state issues the license, an Indian retailer on the reservation would stand in the same position as any other liquor retailer in the state with respect to enforcement of substantive state law. It follows that petitioner's contentions as to the inability of the tribal, state or federal governments to enforce regulations against tribal liquor retailers are inapposite, as are petitioner's speculations about potential conflicts among enforcement agencies.

The resolution of this case in favor of exclusive tribal jurisdiction over liquor licensing will in most cases have little if any impact outside reservation boundaries, making inapplicable another possible reason to review the Ninth Circuit decision. The main result of this case will be that Indian retailers will pay the tribe rather than the state for

their liquor licenses. The state's capacity to protect the public from illegal liquor sales on Indian reservations remains unimpaired.

III. California's Twenty-First Amendment Arguments Are Neither Appropriate Nor Persuasive

A. California cannot advance this argument for the first time in this Court.

California has attempted in its petition to frame the issue in terms of its powers under the twenty-first amendment. Respondent will address those arguments in subsections (B) and (C), infra. However, the twenty-first amendment has never been urged previously by California as a basis for upholding its reservation licensing power, in either the Ninth Circuit or the district court. See Ninth Circuit Clerk's Record, Document Nos. 4, 6; Clerk's Supplemental Record at 68, 141; Appellee's Opening and Supplemental Brief. The state of Washington, in the cases consolidated for oral argument with

Rehner, unsuccessfully argued similar twenty-first amendment issues, but those arguments are specifically identified in the Ninth Circuit decision as Washington's rather than California's. Rehner at 1350. This Court should not grant certiorari to decide an issue that was not raised by petitioner in the proceedings below. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, n. 13 (1976); [unpleaded claim not properly before Supreme Court]; Tennessee v. Dunlap, 426 U.S. 312, 314, n. 2 (1976) [claim pleaded but not addressed by lower courts not considered]. Since similar twenty-first amendment arguments have been flatly rejected by all appeals courts that have considered the issue, see Rehner at 1350, United States v. New Mexico, supra, at 329, and since California has not raised these arguments previously, this Court need not grant certiorari to rule on the issue.

B. California did not acquire territorial jurisdiction over Indian reservations through the twenty-first amendment.

A major premise of California's twenty-first amendment argument is that the amendment granted or reserved to California the power to license and regulate reservation liquor transactions, except as that power was limited by Congress in 18 U.S.C. § 1161. PC 23-24. From that, the state argues that a more stringent interpretation of 18 U.S.C. § 1161 is required, balancing the Indians' rights against the traditionally broad powers of a state to control liquor under the amendment. PC 19-24.

That argument is seriously weakened by a glaring flaw in its underlying premise. Cases have held repeatedly that the twenty-first amendment, while unquestionably increasing the states' power to deal with liquor issues within their jurisdiction, just as clearly did not increase

the states' territorial jurisdiction. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938); United States v. Mississippi Tax Commission, 421 U.S. 599, 613-14 (1975); see generally Annot., 34 L.Ed.2d 805, 822-23. This case requires an inquiry into the respective limits of state, federal and tribal jurisdiction; assuming a grant of state jurisdiction by the amendment sidesteps the major issue, and tilts the balance in favor of the state with a heavy thumb.

It is surprising that California cites Collins in support of its argument that the amendment granted or increased state licensing jurisdiction over federal reservations. PC 7. That case, like this one, turned on the question of who had territorial jurisdiction. Once exclusive federal jurisdiction over Yosemite National Park was established, the conclusion that the amendment did not operate to defeat that jurisdiction was held

to be a necessary consequence: "Where exclusive jurisdiction is in the United States ... the Twenty-first amendment is not applicable." Id. at 538.

On federal lands, California has no jurisdiction except that granted or authorized by Congress. Id. at 533. This is particularly true on Indian reservations, because of the historical sovereign powers of the tribes and the unique federal-Indian relationship: grants of state jurisdiction over Indians "must be express, not implied." Bryan v. Itasca County, 426 U.S. 373, 390 (1976); see also Rehner at 1344. Prior to the passage of 18 U.S.C. § 1161 and "Public Law 280" (Act of August 15, 1953, 67 Stat. 588) ["PL-280"], California Indian reservations were, like Yosemite, under exclusively federal jurisdiction. The Rehner court properly limited its inquiry to the effect those statutes had on California's liquor licensing jurisdiction, and found

no express grant of licensing jurisdiction in those statutes. The twenty-first amendment, since it clearly did not increase the state's jurisdiction, Collins, supra, is not relevant to that jurisdictional inquiry. Petitioner's extensive reliance on its twenty-first amendment arguments only obscures the main issue: did § 1161 operate as a grant of licensing jurisdiction? The Ninth Circuit concluded it did not, and respondent believes that analysis and decision are correct. Since § 1161 did not expressly expand California's power to license reservation liquor businesses, that power remains with the federal government and the tribe.

C. California's asserted twenty-first amendment powers conflict with and are subservient to Federal laws and policies

As discussed above, the amendment did not extend the state's territorial

jurisdiction to federal land, and Indian reservations have historically been enclaves of exclusive federal jurisdiction. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876). Even in areas clearly not under federal territorial jurisdiction, however, there has been a growing recognition that the states' powers under the twenty-first amendment are not unlimited. While the lack of territorial jurisdiction alone defeats California's twenty-first amendment arguments here, as discussed above, this parallel line of authority also argues against recognizing California's reservation liquor licensing jurisdiction. Although it is not necessary to reach this issue to decide the case, the cases illustrate the modern trend weakening the courts' traditional unquestioning deference to state liquor regulation.

There has traditionally been general agreement that the twenty-first amendment

is not a "plenary and exclusive grant" of liquor regulatory power to the states, to the exclusion of national laws and policies. U.S. v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1944). One of the first Supreme Court cases squarely limiting a state's power to regulate liquor sales in derogation of conflicting federal law was Hostetter v. Idlewild Liquor Corporation, 377 U.S. 324 (1964). New York attempted to impose its liquor licensing requirements on an airport shop that sold only to departing passengers. Although the shop was clearly not in a federal enclave that was jurisdictionally exempt under the Collins test, the Court nonetheless held that no state liquor license could be required. In choosing to enforce the Constitution's Commerce Clause provisions over the state's twenty-first amendment rights, the Court observed that the amendment clearly did not repeal other Constitutional provi-

sions. Id. at 332. Invoking a balancing test, the Court concluded that the national Commerce Clause interests outweighed the state's twenty-first amendment rights, and struck down New York's licensing requirement. Id. at 332-33.

This balancing test has since been extended to non-Constitutional Federal laws and policies. In California Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97 (1980), the Court held that violations of the Sherman Act (15 U.S.C. §§ 1 et seq.) could not be shielded by the state's twenty-first amendment rights, observing that the power of the state must yield "when the State's regulation squarely conflicts

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with the regulation imposed by Congress." Id. at 109, n. 11.[3]

California's courts have agreed. In Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971), the California Supreme Court found that a state law prohibiting women bartenders violated the Federal Civil Rights Act and the plaintiffs' equal protection rights, and was therefore invalid. The court explicitly rejected the state's twenty-first amendment arguments, noting that "although some early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later

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[3]It is interesting to note that the California Attorney General in that case evidently took a position adverse to Baxter Rice and the Alcoholic Beverage Control Board, despite its ostensible representation of the Board. The California Regulatory Law Reporter states that Mr. Rice "wrote a blistering letter to the Court denying its approval of AG representation of it." 1 California Regulatory Law Rptr. 36 (Spring 1981). The ABC did not oppose SB 1888. Section I, supra.

decisions have taken a position more in keeping with the original intent of the amendment." Id. at 12, 95 Cal.Rptr. at 335. In a later case involving Sherman Act violations, the same court held that when the twenty-first amendment conflicts with federal enactments, courts must "balance the policies furthered by each in order to determine which should prevail." Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 448; 146 Cal.Rptr. 585, 596; 579 P.2d 476 (1978).

California argues in its petition that this Court should undertake such a balancing test. PC 21-24. Since that test only becomes relevant when state territorial jurisdiction exists, it is not required here. In any event, given federal Indian laws and policies, such a test would not help California. Against (1) the admitted pre-1953 exclusive federal jurisdiction over Indian reservations, PC 7-8; (2) the admitted limited scope of

PL-280, PC 23; (3) the current federal policies favoring tribal self-government and freedom from state jurisdiction, Bryan v. Itasca County, 426 U.S. 373, 376, n. 2 (1976); (4) the preemptive and pervasive federal powers over Indians and their reservations under the Indian commerce clause, Art. 1, § 8, cl. 3 and the powers of Article II, § 2 of the Constitution, cf. Rehner at 1343; and (5) the canon of construction mandating resolution of ambiguities in statutes in favor of Indians, Bryan, supra, at 392, California can muster only its interest under the twenty-first amendment in avoiding the "fragmentation" of state control over licensing. PC 12. The state asserts that depriving it of licensing authority will somehow deprive it completely of its ability to regulate reservation liquor businesses and "the manner in which these businesses are conducted." PC 18. This assertion is flatly contradicted by the

language of 18 U.S.C. § 1161, which requires reservation sales to conform with both state law and federally-scrutinized tribal ordinances. The reservations will not become enclaves of liquor lawlessness merely because liquor sellers do not have state liquor licenses; many controls remain in effect under the Rehner decision to prevent that result. For example, state substantive liquor laws may be enforceable through federal courts or tribal action. Rehner at 1347-48. Some of the most important liquor restrictions are contained in California's Penal Code as criminal laws of statewide application, which are generally enforceable on California reservations under PL-280. See, e.g., California Penal Code §§ 382 [adulterated liquor], 397 [sales to insane or incompetent persons], and 398 [after-hours sales].

California repeatedly equates its lack of power to license with its lack of power to regulate, in depicting the evils of uncontrolled liquor enterprises on Indian reservations. See, e.g., PC 12, 16, 18. As explained above, they are simply not the same. California, the federal government, and the tribes themselves all maintain varying degrees of regulatory control, which in many cases may be considerably more stringent and more immediate than the thinly-spread regulatory enforcement of the California Alcoholic Beverage Control Board. Mrs. Rehner brought this case because she could not afford a California license, not because she sought freedom from state regulation. Complaint, paragraphs 5-8; First Amended Complaint, paragraphs 7-8 (Ninth Circuit

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Clerk's Record, Document Nos. 1, 8).[4] While California has a clear interest in the general regulation of liquor, its interest in licensing is far less compelling. It is that lesser licensing interest that must be balanced against the panoply of Indian interests in determining whether the Ninth Circuit decision impermissibly undermined the state's power. Even under that balancing test, respondent should prevail, especially when considered along with California's lack of territorial jurisdiction over federal lands. Petitioner's twenty-first amendment arguments are simply not persuasive.

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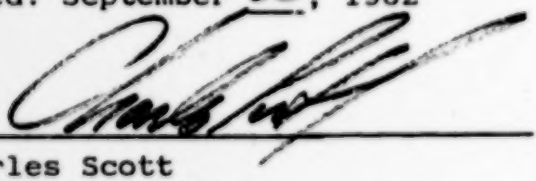
[4]In fact, petitioner Rice has personally advocated changing California's liquor licensing system to remove the economic barrier to new liquor enterprises, by removing the current "cap" that prevents issuance of new licenses in many areas and consequently drives up the price of a license on the open market to $60,000 or more. 1 Calif. Reg. Law Rptr. 37 (Spring 1981).

CONCLUSION

Because of California's legislative acquiescence in the Ninth Circuit decision, the lack of conflict in the circuits, the narrow interests involved, the lack of a valid Constitutional claim and California's failure to raise that claim below, the petition for certiorari should be denied.

Dated: September 30, 1982



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STAFF ANALYSIS OF SENATE BILL 1888 (Dills) SENATE POLICY VOTE: 6-0

As Amended: June 18, 1982 SENATE FLOOR VOTE: 35-0

RECEIVED SEP 27 1982

SUBJECT

Includes premises on Indian land in the category of unlicensed premises to which wholesalers may sell liquor.

DIGEST

Existing law generally requires alcoholic beverage wholesalers to sell only to those retailers licensed by the Department of Alcoholic Beverage Control (ABC). Special exemptions to this provision have been made for nonlicensed retail premises on land maintained by the federal government on military reservations, national parks and veterans homes.

This bill would include retail premises on Indian land or land dedicated for Indian use within the special, nonlicensed premises category.

STAFF COMMENTS

This bill is sponsored by the Wine and Spirits Wholesalers of California in response to the recent court decision in Eva Rainer v. ABC (USCS-77-2409). Among other issues in that decision, the Federal Appeals Court ruled that premises on lands owned by Indians need not be licensed by the ABC.

This bill would allow wholesalers to sell alcoholic beverages to those premises.

KNOWN POSITIONS

SUPPORT: Wine & Spirits Wholesalers of California

There is no known opposition.

CONSULTANT: Lang SB 1888

6/21/82

FILED
OCT 5 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

NO. 82-401

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California

Petitioner,

v.

EVA RENNER,

Respondent.

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether Congress in 18 U.S.C. § 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

(2) If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the state under the Twenty-first Amendment.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

NO. 82-401

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA REHNER,

Respondent.

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE STATE OF WASHINGTON

The decision for which the petitioner seeks review involves three separate district court cases, one from California and the other two from Washington. In the first, the defendant was the petitioner

(hereinafter "California"); in the other two, the defendants were the State of Washington and various Washington state officials.

Although the Washington defendants are not joining California in seeking review of the decision below at this time, this is not because we disagree in any way with California, as to either the importance of the issues or the reasons why the decision below was in error. On the contrary, through this brief as amicus curiae we urge the court to review and resolve those issues in California's petition; and we do so just as strongly as if we had filed that petition ourselves.[1]

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1 Our decision not to file a petition ourselves is based on the fact that California clearly has a final judgment from the court below, while Washington does not. The court below reversed the

Washington is one of the eighteen so-called "monopoly" states, i.e., states which allow sales of liquor by the bottle only through a system of stores owned and operated by the state

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district court in the two Washington cases, in which the district court had entered permanent injunctions against any enforcement of Washington's liquor laws, including the laws imposing taxes on liquor. This reversal was based on the grounds that injunctive relief was "premature" (Pet. App. 30A), since the district court had not considered the issue of the validity of the liquor tax on sales to non-Indians in light of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U. S. 134 (1980) (Pet. App. 27A-30A).

For this reason, we believe a request for review by Washington might itself be viewed as premature. However, much more than tax issues are involved here; and Washington's interest in these other issues is as great as that of California. Hence this amicus brief.

itself.[2] A large number of Indian tribes in Washington are attempting to make an end run on this system.

Besides the two Indian liquor stores which are located on the Tulalip and Muckleshoot Reservations and which are directly involved in the decision below, there are 13 other Indian liquor stores, spread among nine different reservations.[3] Like the Indian cigarette stores, with which this court is familiar from Washington

2 For a list of those states, see Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1977, pp. 2-17. The remaining 32 states, which include California, are known as "license" states, and are listed at pp. 26-27 of the same publication.

3 There is also a sixteenth Indian liquor store which is outside any reservation, although located on Indian-owned restricted land.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the principal trade of these stores is with non-Indians.

The State's concern, however, is not limited to these liquor stores. All of the problems which California discusses in its petition will occur in Washington as well. (See, Petition, 11-19, 25-26.) For Washington also regulates, through a licensing system, sales of liquor by the drink, as in restaurants and bars, and sales of wine and beer, whether by the drink, as in taverns, or by the bottle or can, as in grocery stores. That licensing and regulatory control is asserted over all sellers, be they Indian or not.

The decision below effectively removes that control from the State and

vests it exclusively in Indian tribes, so long as the sellers are in "Indian country," as defined in 18 U.S.C. § 1154(c). And this is so whether the sellers and the buyers are Indian or non-Indian.

REASONS FOR GRANTING THE WRIT

Had the two Washington cases involved in the decision below arisen before the enactment, in 1953, of 18 U.S.C. § 1161, the principal statute involved in this case, the outcome could hardly have been in doubt. Indeed, it is difficult to envision those cases then even arising at all. For Indian reservations were completely dry, by reason of a statute which has been in effect for over a century, 18 U.S.C. § 1154. Washington's off-reservation seizures of liquor

bound for a reservation, to be sold there in violation of federal law, could hardly itself constitute a violation of federal law.

One other effect of § 1154 should be noted. By reason of its provisions, not one shred of tribal self-government or sovereignty existed with respect to alcoholic beverages. Congress had taken the decision completely out of the hands of the tribes. Not only were the reservations to be completely dry, but Indians could not even buy alcoholic beverages off the reservation.

It was against this backdrop that Congress enacted 18 U.S.C. § 1161, Act of August 15, 1953, 67 Stat. 586, the title of which was: "An Act to eliminate certain discriminatory

legislation against Indians in the United States."

By its terms, this Act completely lifted the criminal penalties for sale of alcoholic beverages to Indians outside of Indian country, and conditionally lifted them with respect to sales within Indian country. Within Indian country, such penalties would no longer apply

> ". . . to any act or transaction [which] is in conformity with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . ."

Under the construction urged by California and Washington in the court below, this language puts the states and the tribes on a par. For the federal criminal penalties to be

lifted, the act or transaction must fully comply with all applicable provisions of both tribal and state law. Each has, in effect, a veto. And if one has provisions which conflict with the other, so that compliance with both sets of provisions is impossible, then the criminal penalties are still applicable, and the area of Indian country involved remains dry.

In terms of the individual seller of alcoholic beverages, be he Indian or non-Indian, that seller must obtain a license from both the tribe and the state, if both state law and a tribal ordinance require one. And the seller must meet all the conditions which each establish for that license. If he fails to meet any of the conditions of one or the other, he is subject to the

preexisting federal penalties, just as before the adoption of the Act.[4]

Such, we argued, was the system which Congress established to eliminate the preexisting "discriminatory legislation against Indians." And the system did just that. Indians--and non-Indians for that matter--could buy and sell alcoholic beverages within the reservation under the same conditions and restrictions as anyone else could outside the reservation. The tribe, however, could add further conditions

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4 If, as in Washington, the state says to the seller of liquor by the drink such as an on-reservation operator of a bar or cocktail lounge: "You must buy your liquor only from the state," while the tribe says: "You must buy your liquor only from the tribe," the result is that he is subject to federal penalties if he buys from either, and the reservation to that extent remains dry.

and restrictions as it wished.

Under that system, the scope of tribal power and the scope of state power for legalizing the previously illegal sales of alcoholic beverages would be identical. Each has equal power to make that transaction legal or illegal.

This is not, however, the system which results from the decision below. Rather than make states and tribes co-equal, the decision below vests in the tribes exclusive jurisdiction to license and distribute alcoholic beverages on the reservation. As stated by the majority opinion:

> ". . . We conclude that under section 1161 the tribes have exclusive jurisdiction to license and distribute liquor on the reservation." (Pet. App. 1A).

Thus, far from just eliminating

discrimination against Indians, the system resulting from the decision below makes the Indians "super citizens," to use the term of Judge Goodwin in his dissent. (Pet. App. 47A). As he describes this result in the context of a monopoly state such as Washington:

> ". . . They, [Indians] and they alone, can buy and import at free market prices any liquor they desire. All other citizens of the state of Washington who desire to purchase liquor must join the queue at the government store and select from a monopoly inventory at a monopoly price. . . . I doubt that Congress intended by § 1161 to pave the way for one favored group of citizens to break the state monopolies that are so cherished by money hungry legislatures." (Pet. App. 47A-48A.)[5]

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5 Non-Indians can and do buy at Indian liquor stores. Indeed, that is a large part of our problem. But these non-Indian purchasers are subject to state

Nor is the new type of discrimination created by the decision below confined to monopoly states. Again, that decision vests exclusive licensing and distribution power in the tribes, though "state substantive standards"--whatever might be meant by that term--would still be applicable. (Majority opinion, Pet. App. 21A). Presumably a state law prohibiting sales of liquor to minors would be such a "substantive standard." But what about qualifications for sellers--e.g., lack of a criminal record--designed to make sure such sellers are not the sort of people who would sell to minors?[6]

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prosecution, at least when they bring the liquor off the reservation; and such prosecutions have in fact been brought. Thus, despite these non-Indian purchases, Judge Goodwin's basic point is correct.

Indian sellers now need only to persuade their tribal government to adopt less stringent qualifications on matters such as this--or no qualifications at all--and they can sell liquor to Indians and non-Indians alike on the reservation, while their non-Indian counterparts, off the reservation, cannot.

As stated by Judge Goodwin:

> ". . . Congress indicated no intent to give Indians greater rights than other citizens enjoy with regard to liquor." (Pet. App. 46A).

Yet that is precisely what the decision below gave them.

Nor did Congress indicate any intent to give Indian tribes any greater power than states with regard

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6 See Wash. Rev. Code § 66.24.010(2).

to liquor; yet that too was given the tribes by the decision below. And this aspect of the decision makes a complete nullity of the Twenty-first Amendment, so far as reservation Indians are involved, for the reasons discussed in California's Petition. (Pet. 19-24). The decision in effect turns § 1161 into the equivalent of a Twenty-first Amendment for Indian tribes, while ignoring the effect of the Amendment itself on state power.

One final related point. The Court below phrased the central issue and the result in terms of "jurisdiction." (Pet. App. 1A.) The use of that term, however, only confuses things. That is why we use the term "control" instead. (See p. 5, supra.

We do not claim that § 1161 confers state or tribal on-reservation jurisdiction over anyone, Indian or non-Indian, similar to that conferred on states by Pub. L. 83-280, Act of August 15, 1953, 67 Stat. 586. Rather, § 1161 only authorizes tribes and states alike to establish the conditions and requirements violation of which will trigger federal criminal jurisdiction under § 1154. And those conditions or requirements may include the holding of a license from the tribe, the state, or both, and the meeting of all the qualifications for such a license. Whether the tribe or the state can go further and invoke their own criminal or civil sanctions for selling alcoholic beverages without a license is not determined by § 1161

at all. The determination of that issue will turn on a number of factors, such as the extent of a state's on-reservation jurisdiction, if any, under Pub. L. 83-280, and the applicability of such cases as Bryan v. Itasca County, 426 U.S. 373 (1976), Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), United States v. Wheeler, 435 U.S. 313 (1978), Montana v. United States, 450 U.S. 544 (1981) and Merrion v. Jicarilla Apache Tribe, ___U.S.___ (1982).[7]

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7 We do claim, however, complete off-reservation jurisdiction, upon which were based the off-reservation seizures precipitating the two Washington cases. The Court below erroneously struck down such jurisdiction insofar as it is based on general state police power or the Twenty-first Amendment while leaving open the possibility that it might be based on a state's taxing power. See footnote 1, p. 1, supra.

Thus, Judge Goodwin was certainly correct in his observation:

> ". . . All the discussion in the majority opinion about 'conferring' or 'not conferring' jurisdiction upon the states is interesting but seems unresponsive to the purpose of the statute [§ 1161]." (Pet. App. 46A)

While that statute confers jurisdiction on no one, it confers equal rights of control on both tribes and states. In failing to recognize this, the Court below made its fundamental error, and thereby turned things completely upside down, with critical consequences for every one of the states on which Indian reservations are located.[8] For this reason, that

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8 All states are either monopoly states, like Washington, or license states, like California. See footnote 2, page 4, supra.

decision requires review by this Court.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
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No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether Congress in 18 U.S.C. section 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

2. If section 1161 does not, by itself, provide for application of state licensing laws in Indian country, do the states nevertheless have the authority by virtue of the Twenty-first Amendment to require that liquor transactions in Indian country comply with all laws on the subject.

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No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAXTER RICE, Individually
and as Director of Department
of Alcoholic Beverage Control
of the State of California

Petitioner,

v.

EVA REHNER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals,
Ninth Circuit

BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (Petn. for Writ of Cert. Appnd., pp. A1-49)[1] is reported at 678 F2d 1340. The judgment and findings of fact and

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1. Hereafter abbreviated as (Petn. Append.).

conclusion of law of the District Court are not reported and appear at pages JA-21 - 25 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on June 8, 1982. The petition for writ of certiorari was filed within 90 days of that date, on August 31, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XXI, § 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

United States Code, Title 18:

§ 1161:

"The provisions of section 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

§ 1154:

This statute appears at Petn., Append., pp. A-50 - 51.

§ 1156:

"Whoever, except for scientific, sacramental, medicinal, or mehanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined

not more than $2,000 or imprisoned not more than five years, or both.

"The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. section 1331 because the amount in controversy exceeded $10.000 and the controversy arose under the constitution, laws, or treaties of the United States. Jurisdiction was also invoked under 28 U.S.C., §§ 2201 and 2202. (J.A. pp. 6-7.)

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Eva Rehner is a member of the Pala Band of Mission Indians and owner and operator of a general store on the Pala Indian Reservation in San Diego County. Petitioner is the Director of the Department of Alcoholic Beverage Control of the State of California (hereafter, the Department). The dispute arose because Mrs. Rehner wishes to sell distilled spirits at her store and was informed that petitioner would require her to obtain a license from the Department in order to do so. (J.A. pp. 8-9.)

On February 10, 1977, Mrs. Rehner filed a complaint for declaratory judgment, mandatory injunction, and preliminary injunction. (J.A. p. 1.) On March 7, 1977, a first amended complaint was filed and petitioner moved to dismiss or for summary judgment on the ground the Department had the authority to require

Mrs. Rehner to obtain a state license under 18 U.S.C. § 1161. (J.A. pp. 1-2, 5, 16-17.) Judgment granting the motion to dismiss without leave to amend was filed and entered on May 11, 1977. (J.A. pp. 2, 18-20.)

On May 18, 1977, the District Court filed its Second Amended Findings of Fact and Conclusions of Law. The Court found Mrs. Rehner was a member of the Pala Band of Mission Indians and a federally licensed Indian trader who owns and operates a general store on an Indian reservation. The Court further found Mrs. Rehner desired to sell distilled spirits without first obtaining a license from the Department, and that the Department refused to permit her to sell distilled spirits without a license as required by California law. (Bus. & Prof. Code, §§ 23000 et seq. [West 1964].) (J.A. pp.21-23.)

The court concluded that an exception to the prohibition against sale of alcoholic beverages on an Indian reservation pursuant to 18 U.S.C. § 1161 exists, that the Pala Band of Mission Indians had adopted an ordinance on August 13, 1959, which was certified by the Secretary of Interior on April 11, 1960, providing that liquor traffic shall be lawful within Indian country if it was in conformity with the laws of California, and that Mrs. Rehner could not engage in the sale of distilled spirits without first obtaining a license from the Department in accordance with the laws of California. (J.A. pp. 23-25.)

On May 23, 1977, Mrs. Rehner moved the court for an order vacating the judgment or, in the alternative, for a rehearing and reconsideration. (J.A. pp. 3, 26-27.) The District Court denied the

motions on January 16, 1978. (J.A. pp. 28-29.)

On June 10, 1977, Mrs. Rehner filed a notice of appeal from the judgment. On June 8, 1982, the Court of Appeals reversed and held § 1161 preempted state licensing and distribution jurisdiction over tribal liquor sales in Indian country; accordingly, as long as Mrs. Rehner complied with a tribal ordinance, she was not required to obtain a California license to sell liquor in Indian Country. (Petn., Append., p. A-37.)

SUMMARY OF ARGUMENT

1. When Congress removed liquor prohibition in Indian country in 1953, it required that liquor traffic be "in conformity both with the laws of the State . . . and an ordinance duly adopted by the tribe . . . ." (18 U.S.C., § 1161.) The words "in conformity with" were

construed by the Court in California v. United States (1978) 438 U.S. 645, to require United States' compliance with state regulatory laws, including conditions imposed by a state regulatory agency. The word "laws" was construed by the Court in Maine v. Thiboutot (1980) 448 U.S. 1 to mean all laws, not some subset of laws. The word "both" should be interpreted to give to the states the same authority as is given to the tribes, as construed by the Court in United States v. Mazurie (1975) 419 U.S. 544. There is thus nothing on the face of the statute which suggests Congress meant some, but not all laws, and which prohibits a state from imposing its licensing laws on liquor traffic in Indian country.

This conclusion is supported by the legislative history of § 1161 which demonstrates that Congress intended to

remove discriminations against Indians seeking to purchase and drink alcohlic beverages. It was not the intent of the legislation to shield Indian retailers from state licensing laws. That Congress intended for all state laws, including licensing laws, to apply is further supported by Congress' awareness of pre-existing state laws prohibiting liquor transactions with Indians, and the Twenty-first Amendment, which particularly in 1953, placed the states in a superior position where liquor traffic is concerned. Thus, Congress knew that once federal prohibition was removed, the states, with their regulatory machinery in place, would fill the void.

The system devised by the Court of Appeals, where either the federal government or the tribes would apply state substantive standards, but not licensing

and distribution laws, is unworkable and frustrates this intention. The Court of Appeals did not define the term, failed to give any indication of what state laws are substantive standards, did not further the related goals of combating lawlessness on reservations at a reduced cost, and placed total reliance on a criminal system for the difficult task of regulating liquor traffic. Moreover, Congress knew the tribes were in no position in 1953 to assume the task of regulating liquor traffic and certainly could not do so without state assistance.

2. If § 1161 does not grant the authority for the states to control liquor traffic in Indian country it does not bar such control either. Because neither the tribe nor the federal government have enacted laws or rules regulating liquor traffic to the extent the states have, and

prior to 1953, the tribes never regulated liquor traffic, authority of the states to control liquor traffic within their borders pursuant to the Twenty-first Amendment does not infringe upon the right of Indians to govern themselves and does not conflict with any federal laws. If there is a conflict between the Twenty-first Amendment and the right of Indians to govern themselves or federal laws, the latter must give way to the paramount authority of a constitutional amendment.

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ARGUMENT

I

THE CLEAR MEANING OF 18 U.S.C. § 1161 IS THAT CONGRESS INTENDED FOR ALL STATE LAWS, INCLUDING ITS LICENSING LAWS, TO APPLY TO LIQUOR TRAFFIC IN INDIAN COUNTRY

A. Introduction

Beginning in colonial times and carrying forward to this day, except for the period between 1920 and 1933, the principle that it is the states which exercise control over importation distribution, and sale of intoxicating liquors within their borders is unchallenged. This Court first recognized that authority reserved to the states, and the necessity for state control over liquor traffic in the License Cases (US) (1847) 5 How. 504, 588, 627. As the Court later explained in Crowley v. Christensen (1890) 137 U.S. 86, 91:

"The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. . . It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business--to mitigate its evils or to suppress it entirely." See also California v. LaRue (1972) 409 U.S. 109, 114; Carter v. Commonwealth of Virginia (1944) 321 U.S. 131, 135-137; Duckworth v. Arkansas (1941)

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314 U.S. 390, 392-394; Miller v. Ammon (1892) 145 U.S. 421, 423-424.

With the passage of the Twenty-first Amendment, the powers of the states over the subject of liquor has increased. California v. LaRue, supra; Collins v. Yosemite Park Co. (1938) 304 U.S. 518, 538.

Indeed, Congress clearly understood the preeminent status of the states over the liquor industry when it enacted the Wilson Act in 1890 (c. 728, 26 stat. 313; 27 U.S.C. § 121) and the Webb-Kenyon Act in 1913 (c. 90, 37 stat. 699; 27 U.S.C. § 122). See generally James Clark Distilling Co. v. Western Maryland R. Co. (1917) 242 U.S. 311, 321-324.

Congressional treatment of Indians over the years has, of course, been considerably different. The policy has been one "'. . . of leaving Indians free

from state jurisdiction and control. . .'" McClanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 168. Congress' power over Indian affairs stems from the Indian Commerce Clause, Article I, § 8, Clause 3 of the Constitution and its exercise has been governed to a large extent by the character of the relationship between the United States and the Indian tribes. Id. at 173.

While the relationship between the United States and the Indian tribes has been usually difficult to define, in the area of liquor, it has been rather simple. Until 1953, the policy has been one of prohibition. In 1802, Congress first enacted legislation on the subject of Indians and liquor by authorizing the President to act to prevent the sale and distribution of liquor amoung the Indian tribes. Act of March 30, 1802, c. 13,

2 Stat. 139, 146. Thirty years later, Congress prohibited the introduction of liquor into Indian country and in 1834, Congress made criminal the sale of liquor to Indians in Indian country. Act of July 9, 1932, c. 174, § 4, 4 Stat. 564; Act of June 30, 1834, c. 161, 4 Stat. 729, 732-33.

Without interruption, Congress by statute and treaty (See Perrin v. United States (1914) 232 U.S. 478.) stayed true to that policy, until August 15, 1953, when it enacted 18 U.S.C. § 1161, (c. 502, § 2, 67 Stat. 586) which removed criminal penalties for sales of liquor to Indians and introduction and possession of liquor in Indian country, under certain conditions.

The question presented is whether this legislation means that a State may exercise its historical powers under the Twenty-first Amendment and the police power

over liquor traffic in Indian country in the same manner that it exercises those powers over the remainder of the territory within its borders, as petitioner contends, or whether, as the court below held, this power has, for the first time in this country's history, been placed not in the hands of the State, not in the hands of the Federal government, but under the control of the individual tribes. Analysis of this statute will reveal that it is the States which have been given the authority to control liquor traffic in Indian country.

B. Section 1161 Clearly And Unambiguously Provides That All Sales And Transactions Involving Liquor Occurring In Indian Country Must Conform To All State Laws On The Subject

The starting point in any analysis of a statute is with the words used. American Textile Mfrs. Inst. v. Donovan

(1981) 452 U.S. 490, 508. What is immediately apparent in the words of § 1161 is that the statute contains no technical terms and no definitions. Regarding non-technical terms:

> "Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc. (1944) 322 U.S. 607, 618. See also Watt v. Alaska (1981) 451 U.S. 259, 265-66; Diamond v. Chakrabarty (1980) 447 U.S. 303, 308.

It is similarly apparent that with regard to the critical language of § 1161 (". . . in conformity both with the laws of

the State . . .") no modifying words appear. The court below determined this phrase meant the act or transaction must conform to "substantive state standards," but such phraseology does not appear in the statute. There is absolutely nothing on the face of § 1161 which indicates that Congress placed any restriction or limitation on the scope of the words it employed and none should be implied. Lewis v. United States (1980) 445 U.S. 55, 60.

This is particularly true of the word "laws." In Maine v. Thiboutot (1980) 448 U.S. 1, 4, this Court faced the issue of whether the words "any laws" appearing in 42 U.S.C. § 1983 meant that claims could be made thereunder for a violation of the Social Security Act (42 U.S.C. § 602(a)(7)), or whether the remedy created by § 1983 applied only to constitutional violations. The Court held:

> "The question before us is whether the phrase 'and laws,' as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." Id.

The phrase "in conformity with" has also been construed recently by this Court in California v. United States (1978) 438 U.S. 645. Section 8 of the Reclamation Act of 1902 requires the Secretary of Interior to proceed "in conformity with" State laws governing the "control, appropriation, use or distribution of water." California law required a permit from the State Water Resources Board for

any person to appropriate water and allowed the Board to impose conditions to insure the "reasonable" and "official" use of the water. Pursuant to this authority, the Board approved the application by the Bureau of Reclamation for a permit to appropriate water but attached 25 conditions to the permit. Id. at 650-52, and footnotes 7, 8. The court, after reviewing the legislative history of the Act and the federal-state relationship regarding water reclamation, concluded that section 8 required the Secretary of Interior to comply with state permit laws and conditions imposed by the states on the permit. The court thus concluded that the statutory language, interpreted in light of its history, required the United States to conform to both the substance and the form of state order law. Id. at 670-679. Since the deference accorded by Congress to state

water laws is identical to the deference Congress has given to state liquor laws, the fact that identical words are used clearly supports the conclusion that an identical meaning is intended.

Finally, the word "both" appears in § 1161. In United States v. Mazurie (1975) 419 U.S. 544, 557, the Court upheld the delegation of authority over reservation liquor transactions to the tribes because the tribes held a measure of sovereignty over both its members and its territory. Because the word "both" preceeds reference to "the laws of the State" and "an ordinance duly adopted by the tribe . . .," the only reasonable conclusion which may be drawn is that whatever power is given to the tribe is also given to the state. Only by the most tortured reading of this word could the court below determine that the power

delegated to the tribes under § 1161 was not the same power delegated to the states. See Petn. Append., A-13 - 15. This tortured interpretation of the plain meaning of the words used should be rejected. The act or transaction permitted under § 1161 must conform to both state laws and a tribal ordinance, and the only way to read this language is to conclude that state law, whatever it may be, and a tribal ordinance, whatever it may be, are to be treated the same.

Given the statutory language employed, and the construction to be given that language, the Court of Appeals' decision construing "the laws of the State" to mean substantive state standards is particularly troubling because a number of factors are missing. Under the Court of Appeals' reading, a delegation of power was made only to the tribes. Clearly, the

tribes are authorized to implement their own ordinances. But it is not at all clear who is to implement state laws. For a delegation of power to be made properly, Congress must delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated power. American P. L. Co. v. Securities and E. Com. (1946) 329 U.S. 90, 105.

If the states have been delegated the power to implement their laws, these rules are clearly satisfied, for the states are limited by their own policies and procedures. But if the states are not delegated this power, there is no statement set forth of general policy, of the recipient of the power to apply state law, and of the boundaries of that power. Everything must be implied including a definition of the term "substantive state standards." In light of the absence of any

language remotely suggesting a limitation on the applicability of all of a state's liquor laws in Indian country, and in light of the Court of Appeals' inability to state what Congress intended by this phrase, the only reasonable conclusion which may be drawn from the words employed is that Ccngress intended a delegation to the states, with the power in the states to enforce their laws as they know, understand, and execute them.

The notion that "laws of the State" means substantive state standards has a very fragile history, supported only by dicta.[2/]

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2. As will be shown, in fact, there was never any mention of this concept when HR 1055, the bill which ultimately became section 1161, was pending in Congress, nor does the phrase appear in the statute as it was enacted.

Respondent's argument below was that the word "standard," and therefore the exclusion of licensing laws from state authority to regulate liquor traffic, sprang from the Court's decision in Warren Treaty Post v. Tax Comm'n (1965) 380 U.S. 685. (R 108.) In point of fact, the Court merely cited § 1161, describing it as "permitting application of state liquor standards within an Indian reservation under certain conditions" in a footnote and without any discussion that the word "standard" was meant to prevent the states from exercising their traditional authority over liquor traffic. Id. at p. 687, n. 3.

If dicta should be permitted to control the result in this case, the dicta in Organized Village of Kake v. Egan (1962) 369 U.S. 60, should, where the Court, in the course of discussing the increase in state influence over tribes since 1929, said:

"Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U.S.C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." Id. at 73-74.

Again, in United States v. Mazurie, supra, 419 U.S. at 547, the court described § 1161 as follows:

In 1953 Congress passed local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated."

Thus, in neither Kake nor Mazurie did the court detect the idea that "laws of

the state" did not mean all state laws, including state licensing laws. Similarly, Congress never detected this concept. Rather, the Court in those cases, upon reading § 1161, reached the correct conclusion that state law applied with tribes given the power to prevent introduction of liquor onto reservations if they so desired.

In the name of statutory construction, the court of appeals has taken a statute with plain, non-technical, unambiguous language and by adding words and finding some words missing, manufactured an ambiguity. With an ambiguity at hand, the court had no difficulty then employing the canon of construction which requires ambiguities be resolved in favor of Indians, to reach the desired result - exclusion of state control over the liquor traffic within a state's boundaries but

within Indian country. The court went too far; "'[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent.'" Andrus v. Glover Construction Co. (1980) 446 U.S. 608, 619. See also DeCoteau v. District County Court (1975) 420 U.S. 425, 447. Cf. United States v. Batchelder (1979) 442 U.S. 114, 121-122; Perrin v. United States (1979) 444 U.S. 37, 49 n. 13. Congressional intent, unambiguous and evident from the face of the statute, clearly requires that an act or transaction involving liquor in Indian country conform to state law - all state laws - to the same extent an act or transaction occurring anywhere else in the state must conform to state law.

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C. The Legislative History Of 18 U.S.C., § 1161, Conclusively Establishes a Congressional Intent For All State Law, Including Its Regulatory Laws, To Apply To Liquor Transactions In Indian Country

The legislative history of § 1161 is rather sparse. What is absolutely clear in that history, however, is that there was no intent on the part of Congress to depart from the plain meaning of the words employed. See Maine v. Thiboutot, supra, 448 U.S. 1, 7-8.

The most striking feature of the legislative history is that the legislation had nothing to do with Indian retailers or jurisdiction. H.R. 1055, as originally introduced by Congressman Patten, was called "A Bill to terminate Federal discrimination against the Indians of Arizona." Appendix A, p. A-4. By removing federal discrimination, the bill was designed to allow Indian consumers

to purchase liquor like anyone else and to allow liquor to be sold in Indian country as it is sold elsewhere in the state. There is nothing in the title of the act which suggests that by terminating federal discrimination against Indians, Indians residing in Indian country would be placed in a position superior to that of non-Indians. The title of an act is often useful in determining the meaning of the words used in the act. Federal Trade Commission v. Mandel Bros. (1959) 359 U.S. 385, 388-389. Yet if not all state laws apply, as the Court of Appeals held, the result is superiority for Indians, not equality. Cf. Washington v. Confederated Tribes of the Colville Indian Reservation (1980) 447 U.S. 134, 155.

That equality and therefore application of all state laws, was the goal can be seen from the hearings on the bill

held on March 18, 1953, May 6, 1953, and June 2, 1953. Hearings on H.R. 1055 Before the House Committee on Interior and Insular Affairs, 83rd Cong. (See Append.) At the hearing held on March 18, 1953, Mr. Rhodes, the representative from Arizona, pointed out that the bill was introduced by his colleague from Arizona, Mr. Patten because federal liquor laws were discriminatory and unnecessary. He explained that the continued prohibition was detrimental to the Indians and would be harmful if continued. He also noted that Arizona was required by enabling legislation to include in its constitution a provision that no sale of liquor be made to an Indian or on Indian land. The bill, he pointed out, would allow Arizona to amend its constitution to remove these prohibitions. Appendix A, pp. A-8 - 11.

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The commissioner of the Bureau of Indian Affairs of the Department of Interior, Mr. Myer, appeared at the hearing and agreed that the prohibition relating to intoxicating liquor should be eliminated as discriminatory. When asked if the bill would have any effect on the statutes of the individual states, Mr. Myer replied:

> "We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided.
>
> "I have been informed - and I did not see this report until last night, and it was rather late when I read it, and I did not have much time this morning, and I did not raise the question - but I have been advised that this report is intended to eliminate all of the sections in the statutes which discriminate against

> Indians and at the same time not interfere with State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law." (Emphasis added.) Appendix A, pp. 26-27.

Further testimony was heard on behalf of several Indian tribes in which support of the bill was voiced. The point made was that the intent of the bill as understood by these Indian tribes was to remove federal discrimination against them; there was no mention that Indians be placed in a position superior to non-Indians or that not all state laws be applied. Appendix A, pp. A-32 - 44.

At the hearing held on May 6, 1953, an unofficial report from the Secretary of the Interior was read into the

record. Again the point was made that the federal liquor laws relating to Indians was discriminatory and should be made inapplicable to transactions occurring not just in Arizona but throughout the United States ". . . if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to state law." Appendix B, pp. A-53 - 54. Later, a telegram indicating the support by the Navajo tribe of the bill and giving Navajos equal rights was read into the record. Appendix B, pp. A-58 - 59.

Lastly, on June 2, 1953, the sponsor of the legislation, Mr. Patten, appeared and at one point stated ". . . if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard . . . ." Appendix C, p. A-69. Congressman Engle from California made the

point that the legislation was intended to equalize the treatment of Indians and noted that after California had repealed its laws preventing sales of liquor to Indians, a great deal of confusion had arisen because of the application of federal liquor laws. It was also noted that New Mexico had recently removed its restrictions. Appendix C, pp. A-73 - 75.

At no time during the discussion in any of these hearings was a motive other than removal of federal discrimination discussed. This was not a bill dealing with economic development or protection of Indian retailers; it was one designed to place Indians and Indian retailers in Indian country on an equal footing with non-Indians and retailers not on Indian reservations. And it is quite clear from the comments of all concerned that this equality was to be accomplished by the

application of state law, not some state laws, with Indian tribes given the power to veto introduction of liquor into their reservations if they so desired. See also S. Rep. No. 722, 83rd Congress (1953) (U.S. Code Cong. and Admn. News, p. 2399).

The Court of Appeals apparently assumed that with the passage of § 1161, the states, for the first time, were given the authority to regulate liquor transactions involving Indians and therefore required that a grant of jurisdiction be explicit. These Congressmen, however, knew better; the states for many years, with full knowledge of Congress, have prohibited transactions with Indians.

Indeed, the states have not merely exercised that power, in two cases, Congress has required them to do so. In the enabling acts which permitted Arizona

and New Mexico to enter the United States, Congress required that the two states enact irrevocable (without the consent of the United States) ordinances prohibiting the sale of liquor to Indians and the introduction of liquor into Indian country. Act of June 20, 1910, c. 310, § 2, 36 Stat. 557, 558. (New Mexico); § 20, 36 Stat. 569 (Arizona)[3/]

California likewise has prohibited liquor transactions with Indians for a long time. California's first prohibition was enacted on April 22, 1850. Cal. Stats. 1850, c. 133, pp. 408-409, § 15. This statute was enacted into the California Penal Code in 1872 and remained in force until 1953, when it was deleted. Cal.

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3. In recognition of this prohibition on sales to Indians or in Indian country in Arizona and New Mexico, Congress in enacting § 1161 gave the consent of the United States to repeal these provisions in the Arizona and New Mexico Constitutions. Act of August 15, 1953, c. 502, § 3; 67 Stat. 586.

Stats. 1953, c. 146, page 918, § 1.[2/] The prohibition was upheld as a valid exercise of the state's police power by the California Supreme Court in People v. Bray (1894) 105 Cal. 344, 38 P. 731.

California has not been alone; a number of other states and territories have enacted similar statutes and then upheld them. State v. Lindsey (Wash. 1925) 233 P. 327, 133 Wash. 140; State v. Rorvick (Ida. 1954) 277 P.2d 566, 76 Ida. 58; People v. Gebhard (Mich. 1908) 115 N.W. 54, 151 Mich. 192; State v. Wise (Minn. 1897) 72 N.W. 843, 70 Minn. 99; Dagan v. State (Wisc. 1916) 156 N.W. 153, 162 Wisc. 353; Territory v. Guyot (Mont. 1889) 22 P. 134, 9 Mt. 46; Tate v. Smith (Neb. 1889) 78 N.W. 494, 58 Neb. 296.

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4. It was apparently this legislation which was approved by the governor on April 8, 1953, to which representative Engle referred. Appendix C, pp. A-73 - 74.

Application of state liquor laws involving Indians is consistent with declarations from this Court that federal authority is not exclusive and that the states, under their police powers, have the right to legislate in order to protect people within their borders. In United States v. McGowan (1938) 302 U.S. 535, 539, while deciding that a Nevada colony was Indian country, the Court explained:

> "The federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only effect the operation, within the colony, of such state laws

as conflict with the federal enactment."

In Dick v. United States (1908) 208 U.S. 340, 353, the Court pointed out that the principle that a state has full and complete jurisdiction over all persons and things within its limits is of equal dignity with the principle that Congress' power to regulate commerce with Indians is superior and paramount to that of the state. The court, however, did not indicate this power was exclusive. "'[A]bsolute' federal jurisdiction is not invariably exclusive jurisdiction." Organized Village of Kake v. Evans, supra, 369 U.S. 60, 68. The tension between these two principles is resolved by prohibiting the state from acting if such action ". . . would impair the power of Congress to regulate commerce with the Indian tribes." Dick v. United States, supra, at 353.

Since Congress knew the states were in fact active in the Indian liquor area, Congress clearly anticipated that once federal prohibition was removed, state regulation would not impair its power to regulate commerce with Indians and consequently would control if the tribe also agreed to removal of prohibition. It was not a matter of Congress conferring authority on the states over liquor traffic with Indians, it was a matter of increasing the scope of that authority by removal of federal authority. Congress thus anticipated a termination of discrimination would occur simply by removing federal impediments to further state action and require liquor transactions be in conformity with state law. Under these circumstances, the Court of Appeals' extensive discussion concerning jurisdiction was wholly irrelevant.

Finally, it should be noted that Public Law 280 (67 Stat. 589, 18 U.S.C. § 1162 and 28 U.S.C. § 1360) was enacted at the same time as § 1161. This legislation gave several states certain criminal and civil jurisdiction over Indians in Indian country. According to this Court in Bryan v. Itasca County (1976) 426 U.S. 373, 380, the primary concern of Congress in enacting these laws ". . . was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." The method chosen--conferring of jurisdiction on the states--was financial; it was the cheapest solution available to Congress. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 541-542 (1975).

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The same should be true of liquor enforcement. Allowing the states to shoulder the responsibility of regulating liquor traffic in Indian country satisfies both of these motivations; the states already have the machinery to enforce its laws and the states will pay for that enforcement. If the states are excluded from enforcing their laws, then the added responsibility of enforcement falls onto tribal or federal shoulders, along with its added costs. Since Congress believed the federal and tribal law enforcement capability was inadequate to begin with, Congress surely could not expect that capability to cope with the increased burdens placed on it by repeal of prohibition in Indian country.

In summary, the legislative history supports the conclusion initially drawn from the plain meaning of the words

used, that the states may regulate liquor traffic in Indian Country to the fullest extent allowed by their laws. There is absolutely no legislative support for the proposition that the legislation was intended to exclude state licensing and distribution laws, and therefore preclude the states from enforcing those laws.

D. 18 U.S.C. § 1161, Considered In Light Of The Twenty-First Amendment And The States' Historical Authority Over Liquor Traffic, Should Be Construed To Permit The States To Exercise That Authority Over Liquor Traffic In Indian Country

When Congress considered removing federal barriers to liquor traffic in Indian Country in 1953, it was undoubtedly aware of the states' plenary authority over liquor traffic within their borders. That authority springs from the police power reserved to the states and the Twenty-first Amendment. Carter v. Commonwealth of

Virginia, supra, 321 U.S. 131, 135-137; Duckworth v. Arkansas, supra, 314 U.S. 390, 392-394; Ziffrin Inc. v. Reeves (1939) 308 U.S. 132, 138-139. See generally, Craig v. Boren (1976) 429 U.S. 190, 205-206.

The early cases interpreting the Twenty-first Amendment took the position that it in effect overrode the provisions of the commerce clause (Art. I, § 8, cl. 3) of the United States Constitution.5/ The Court in State Board of Equalization v. Young's Market Co. (1936) 299 U.S. 59, held that a California statute enacting a license fee for the privilege of importing beer into the state did not violate the commerce clause against imported beer wholesalers, since the Twenty-first

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5. This is the same clause from which Congress derives its power to regulate commerce with Indian tribes. McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. 164, 172, n. 7.

Amendment gave California the authority to simply prohibit the importation of liquor into the state in violation of any laws of the state. See also Ziffrin Inc. v. Reeves, supra, 308 U.S. 132, 138 ("The Twenty-first Amendment sanctions the right of a state to legislate concerning its intoxicating liquors brought from without, unfettered by tme Commerce Clause"); Carter v. Commonwealth of Virginia, supra, 321 U.S. 131; Mahoney v. Joseph Triner Corp. (1938) 304 U.S. 401, 403-404; Joseph S. Finch and Co. v. McKittrick (1939) 305 U.S. 395; Indianapolis Brewing Co. v. Liquor Control Com. (1939) 305 U.S. 391, 394.

It was not until 1964, 11 years after Congress enacted § 1161, that the situation changed. In Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324,

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the court first described those early years as follows:

> "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants designed for use, distribution, or consumption within its borders . . . This view of the scope of the Twenty-first Amendment with respect to a state's power to restrict, regulate, or prevent the traffic or distribution of intoxicants within its borders has remained unquestioned." Id. at 330.

When the court in Hostetter declared that the Twenty-first Amendment did not repeal the Commerce Clause (id. at 332) this was the Court's first

announcement that there were limits on the Twenty-first Amendment. But in 1953, those limits have not yet been announced. Thus, in enacting § 1161, Congress undoubtedly felt itself required to recognize the authority of state to regulate liquor traffic in Indian Country and this is what Congress did when it required that liquor traffic must be made "in conformity with" state law. To ignore the impact of the Twenty-first Amendment and the historical role of the states in their efforts to control liquor traffic, the Court of Appeals ignored the true relationship between the federal government and the states, and failed in its duty to construe together a statute and a constitutional provision on the same subject. Cooper Mfg. Co. v. Ferguson (1885) 113 U.S. 727, 737. See also McCullough v. Commonwealth of Virginia (1898) 172 U.S. 101, 112.

The historical context should also be examined. Passage of the Twenty-first Amendment accomplished the repeal of national prohibition and was intended to permit each state to decide for itself the proper methods of regulating liquor traffic within its borders. States were permitted to become "dry" or "wet" without fear that the Commerce Clause would be used as a weapon to free interstate trafficking in liquor from state control. See Comment, The Effect of The Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Columbia L Rev 1578 (1975).

As the legislative history has shown, Congress had this purpose in mind when it enacted § 1161. First, the states and then the tribes were given the authority to determine if Indian country was to be "wet" or "dry." In 1954, the year after enactment of § 1161, 83.7 percent of the

United States' population resided in "wet" areas, two states with substantial areas of Indian country, Mississippi and Oklahoma, were entirely dry, and most other states had "local option" legislation which permitted localities within a state the option of remaining "dry." See, The Joint Committee of the State to Study Alcoholic Beverage Laws, Alcoholic Beverage Control, (1960) at page 78. Thus, § 1161 represents a congressional balancing of federal-Indian interests in regulating liquor traffic in Indian country with the interests of the states regulating liquor traffic within their borders.

Not only did the Court of Appeals fail to consider any of this, its requirement that a grant of state jurisdiction over liquor traffic in Indian country be express (Petn. Append. pp. 6-A - 7-A) caused an even more startling consequence: the

repeal of the Twenty-first Amendment in Indian country by implication. Repeal of statutes by implication is disfavored (Allen v. McCurry (1980) 449 U.S. 90, 99) and a repeal will be found, in the absence of some affirmative showing of an intention to repeal, only when two statutes are irreconcilable (St. Martin Lutheran Church v. South Dakota (1981) 451 U.S. 772, 778). There is nothing in § 1161 to indicate Congress did not intend that the Twenty-first Amendment would apply, and application of the Twenty-first Amendment in Indian country is not irreconcilable with Congress' intention to remove liquor discriminations against Indians. If this case must be decided on what Congress did not say, then a construction which avoids an implicit repeal of a constitutional amendment should be preferred to a

construction which is based merely upon a rule of statutory construction.

E. The Absence Of The Word Jurisdiction In § 1161 As It Relates To State Laws Does Not Prevent The State From Exercising Control Over Liquor Traffic In Indian Country Located Within Their Borders

The Court of Appeals' reasoning in this case may be reduced to one point: Congress did not use the word "jurisdiction" when it referred to state laws and this omission meant Congress did not intend that a state's regulatory laws should apply. (Petn.-Append. pp. A-10 - 27.) However, Judge Goodwin's point that the majority opinion discussion concerning the "conferring" of jurisdiction upon the states ". . . is interesting but seems unresponsive to the purpose of the statute" (id. at A-46) is the correct one.

As we have shown, the purpose of § 1161 was to allow Indians to purchase liquor on an equal footing with non-Indians, and the mechanism Congress chose was removal of federal prohibition as long as liquor traffic conformed to both state laws and a tribal ordinance. State laws are designed to control the liquor industry, including such business matters as the identity of the retailer, the location of the outlet, potential consumers and employees, hours of operation, payment of taxes, recordkeeping, labeling and advertising, and the like.

Viewing the matter as the Court of Appeals did as one of jurisdiction is

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inappropriate.[6/] Jurisdiction is apparently used by the court in a judicial sense, of the power of the court to entertain suits and decide cases (General Investment Co. v. New York C.R. Co. (1926) 271 U.S. 228, 230; Erickson v. United States (1924) 264 U.S. 246, 249) and so viewed, requires jurisdiction by the court over the persons and subject matter of the action (F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson (D.C. Cir. 1980) 636 F.2d 1300, 1318).

The Department in this case is not interested in California acquiring judicial jurisdiction over the person in order to

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6. It has already been shown that Congress knew the states had been exercising some control over liquor traffic with Indians. If this must be viewed in jurisdictional terms, Congress thus knew the states already possessed jurisdiction over the subject matter, and any further grant of such jurisdiction was unneccessary.

resolve controversies or to punish wrongdoers. The aim of regulation in California is protection of the public, not punishment (Cal. Bus. and Prof. Code, § 23001 [West 1964]; Lacabanne Properties Inc. v. Dept. of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 190, 67 Cal.Rptr. 734) and that is accomplished by the state exercising power over a license. Through the use of a license, a state can make all the decisions necessary to properly implement its decisions, without ever requiring the services of a court. It is clearly in this sense--the sense of control over liquor traffic within a state--with which Congress was concerned when it enacted § 1161, and it is in this sense that the Department seeks to require Mrs.

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Rehner obtain a license before she may sell liquor.[7]

Moreover, viewing the matter as one of jurisdiction merely fragments the matter. The situation of jurisdictional concepts results in the states not having control over Indian retailers, then it also results in the tribes not having control over non-Indian retailers. Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191. It is much more reasonable to conclude that Congress intended joint control by both states and tribes than partial control by each.

Because Congress was interested in controlling liquor traffic, not providing for state punishment of criminals or the settling of civil disputes, a comparison of

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7. There is no issue before this Court regarding state criminal enforcement of California's liquor laws.

the wording of § 1161 with the wording of Public Law 280 accomplishes little. Public Law 280 was truly concerned with jurisdiction in the traditional, judicial sense, which Congress evidently realized, while § 1161 was not.

But if Public Law 280 must be read in pari materia with § 1161, then the intent of those laws should be examined, not simply the words. Public Law 280 was intended to allow states to assume criminal and civil jurisdiction over certain matters, in the place of the federal government. See Menominee Tribes v. United States (1968) 391 U.S. 404, 411-412. Clearly, the intent of § 1161 is the same. The construction offered by the Court of Appeals, however, requires federal regulation to continue, and in fact, requires federal authorities to know state laws so that violations of those laws may

result in federal prosecutions. Where the Court of Appeals erred is in concluding that federal prosecution was the sole method for regulating liquor traffic. By giving the states the regulatory authority to enforce their liquor laws allows the United States to play a lesser role in liquor matters in Indian country, and accordingly advances the intent of Congress expressed in § 1161 and Public Law 280.

The reasoning of the Court of Appeals regarding a comparison between § 1161 and other statutes, in particular, the Assimilative Crimes Act, 18 U.S.C. 13 (c. 645 62 stat. 680) and the Major Crimes Act, 18 U.S.C. section 1153 (c. 139 62 Stat. 758) is also faulty. The Court of Appeals correctly pointed out that these statutes incorporate state laws into the definition of federal crimes but gives the state no jurisdiction. (Petn. Append. A-21 - 24.)

That intent is clear from the face of the statutes and it is difficult to see how Congress could have more clearly expressed that purpose. But from this premise, the Court of Appeals incorrectly concluded that § 1161 incorporates state 'standards,' not all a state's laws, and that as a result of this incorporation, state regulatory control is excluded. There is nothing in § 1161 which supports either of these conclusions.

With respect to standards, § 1153 specifically refers to laws ". . . enforced at the time of such offense . . ." while § 13 refers to laws ". . . enforced at the time of such act or omission." Thus, the statutes clearly state which laws are to be applied and reflect every addition, repeal, or amendment to those laws. However, § 13 previously referred to laws "now enforced" or "now provided" (see United States v. Sharpnack

(1958) 355 U.S. 286, 291-292), which suggests that only those state laws in existence at the time the federal statute was enacted would be incorporated. In either event, Congress was concerned that potential defendants knew exactly which laws were to be incorporated. In § 1161, Congress' failure to modify the word "laws" points away from a conclusion that it meant to incorporate only state "standards," meaning something less than all the state's laws, and points toward the conclusion Congress intended all the state laws to apply, including licensing laws.

This should be clear from United States v. Mazurie, supra, 419 U.S. 544. The Mazuries were convicted of violating § 1154 because they failed to obtain a tribal license. There is nothing in § 1161 to suggest that a federal prosecution may not be maintained because a non-Indian violated

a tribal licensing requirement just as there is nothing in § 1161 to suggest a federal prosecution may not be maintained because an Indian violated a state licensing requirement. If a federal crime occurs in the first case, it occurs in the second, because the language in § 1161 ("in conformity both") is identical.

Just as important is the absence of any indication in § 1161 that a state regulatory system, enforced by the state, cannot coexist with the federal penalties. Sections 13 and 1153, and the surrounding circumstances, plainly indicate that state criminal laws would be employed by the United States in federal criminal prosecutions. There is no language in § 1161 which is similar to this language. But the language which is used suggests that just as a tribe may insist upon a tribal license (United States v. Mazurie,

supra), so too may a state insist upon a state license. And it necessarily follows that if a license may be required, action against it may be undertaken.

One subject area the Court of Appeals did not consider was other federal laws on the subject of liquor. For example, 18 U.S.C. § 1262 (Act of June 25, 1948, c. 645, 62 Stat. 761.) makes criminal the importation or transportation into a state of liquor if such liquor is not accompanied by a permit or license required by the state or is prohibited completely by the state. Congress then incorporated into § 1262 ". . . the definition of intoxicating liquor contained in the laws of the respective States . . ." Had Congress intended in § 1161 to incorporate only some state laws, it could, using § 1262 as a model, declare which such statutes would be incorporated.

Further, had Congress intended that state licensing laws not apply, it is reasonable to conclude that Congress would have treated liquor traffic in Indian country as it treats liquor traffic in interstate and foreign commerce. The Federal Alcoholic Administration Act, 27 U.S.C. §§ 201 et seq. (Act of August 29, 1935, c. 814, § 1, 49 Stat. 977) contains comprehensive legislation designed to regulate interstate and foreign commerce in liquor through a permit system. It may be possible to prohibit liquor traffic in statutes such as 18 U.S.C. §§ 1154 and 1156, but once liquor traffic is permitted and the need rises to regulate it, the act makes it clear Congress was well aware that a comprehensive system was required. Certainly the tribes had no comparable system available in 1953; they had lived under prohibition since 1802, and could not be expected to fill the void

created when prohibition was lifted.[8] But the states had such machinery available. by not creating a system comparable to the Federal Alcohol Administration Act to be applicable to liquor traffic in Indian country, and instead requiring liquor traffic conform to the laws of the state, Congress expressed its intention that state laws, including licensing and distribution laws applied.

It should be clear by this time that what Congress did not say should not be given the weight that should be placed on the words Congress did use. One can speculate and debate at length as to a better or clearer way to convey an idea. Taking the words Congress did use, in light of the legislative history of § 1161, in light

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8. Few Indian tribes even had court system at this time. Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. 191, 197.

of the extent of state action and power over liquor traffic both in and out of Indian country prior to 1953, and in light of the Twenty-first Amendment, the conclusion that all of the states laws on the subject of liquor applied in Indian country is a compelling one.

F. The Construction Of § 1161 Placed On It By The Court Of Appeals Is Unworkable And Frustrates The Application Of State Laws

It is one thing for a court to interpret a statute, it is quite another for the statute to be implemented as so construed. Accordingly, proper interpretation of a statute requires the court to consider how well its interpretation will work in practice.

"'There is a presumption against a a construction which would render a statute ineffective or inefficient or which would cause grave public injury

or even inconvenience.'" United States v. Powers (1939) 307 U.S. 214, 217.

The construction given § 1161 by the Court of Appeals conflicts with this presumption. According to the Court of Appeals, California cannot license Indians who sell liquor on reservations and therefore cannot enforce any of its laws through disciplinary actions against the licensee, nor can California even bring an action for declaratory or injunctive relief against a tribe to compel or to enforce California standards. (Petn. Append. p. A-36.) In other words, the California Legislature may pass laws called "substantive state standards," but California cannot enforce those laws in Indian country.

The court announced this limitation on state authority in broad terms. When the matter of implementation arises, significant problems also arise. The first and most

obvious is whether a distinction between substantive state standards and "state licensing and distribution jurisdiction" (Petn. Append. pp. A-21, 27) may be drawn. The California Alcoholic Beverage Control Act, (Cal. Bus. and Prof. Code, §§ 23000 et seq. [West's 1964])[9/] makes no distinction between state standards and licensing, and indeed, many standards are embodied in statutes which appear at first blush to be licensing stautes. Section 23300 requires any person engaging in the liquor business to obtain a license but not everyone may hold a license. An applicant for a license must state he has not been convicted of a felony and has not violated and will not violate any provision relating to alcoholic beverages. § 23952. If the application is for a retailer's license, the premises must be

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5. All references will be to this code unless otherwise noted.

approved by the Department which has the authority to deny an application for a license if issuance would tend to create a law enforcement problem or result in or add to an undue concentration of licenses. § 23958. See Department of Alcoholic Bev. Control v. Alcoholic Bev. Etc. Bd. (1982) 133 Cal.App.3d 814; 184 Cal.Rptr. 367. Thus, in these statutes, the California Legislature has set forth the substantive policy that protection of the public welfare and morals requires limits on the number, identity of licensees, and the location of retail establishments. See also § 23789 (restrictions on locations near churches, hospitals, schools and public playgrounds, § 23790 (compliance with zoning laws)). But if licensing laws are not applicable to Indian country, then anyone may sell liquor anywhere within Indian country, regardless of the effect such laws may have on the

public welfare and morals of Indians and non-Indians alike.

Where the line between substantive state standards and licensing may be drawn is another difficult problem. Obviously a state statute prohibiting a sale of liquor to a minor (§ 23658) would be a substantive state standard, but are department regulations prohibiting nude dancing such standards? Title 4, Cal. Admin. Code, §§ 143.2 through 143.4. Those regulations are substantive in the sense they are designed to protect the public welfare and morals. This court in California v. LaRue, supra, 409 U.S. at 115-116 agreed. But because the rules were promulgated by California's licensing agency, they may well not carry over into Indian country. Indeed, the entire administrative structure in Title 4, Cal. Admin. Code, chap. 1, which includes numerous substantive

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rules,[10] may well be excluded from Indian country by the Court of Appeals' decision.

Even if the standard appears in a state statute, its character is not always clear. For example, it is a misdemeanor in California to refill packages to which federal revenue stamps have been attached (§25176), to sell such refilled packages (§25177), to sell alcoholic beverages for on-premises consumption without proper presentation of a brand-type, or character (§§ 25609, 25614), to sell as a whiskey a liquor product that has not met specific standards (§ 25175), and so forth. It simply

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10. See e.g. Title 4, Cal. Admin. Code, §§ 27 (sale of alcoholic beverages only in original package), §§ 52 and 53 (restrictions on the giving of gifts and samples), §§ 57.6, 57.7 and 57.8 (qualifications of a manager and lessee), § 62 (law enforcement personnel prevented from holding licenses to protect against conflict of interest), § 104 (prevention of misleading advertising), § 130 (labeling requirements) etc.

cannot be determined accurately simply by looking at a statute whether it is a substantive state standard.

What was absolutely necessary, and what the Court of Appeals failed to do, was provide an adequate definition of substantive state standard so that the above statutes, as well as the hundreds of other California statutes on the subject, and the statutes of other states employing a licensing System, and those employing a monopoly system, could be classified properly. This is not a mere intellectual exercise. By failing to conform to state law, a person engaged in liquor traffic in Indian country has committed a crime under 18 U.S.C., § 1154 or 1156. Therefore, to avoid a charge that the statutes are unconstitutionally vague (see United States v. Batchelder, supra, 442 U.S. at 123), a clear definition is absolutely necessary. The Court of Appeals' failure in

this regard renders the criminal sanctions virtually unenforceable, with the result that liquor traffic in Indian country is under no state control whatsoever.

The Court of Appeals' system is unworkable for other reasons. By removing state licensing authority, the court has removed state enforcement authority, which leaves the authority in either the tribes or the federal government, neither of which is equipped to handle the matter. As previously pointed out, Public Law 280 was enacted because of the problem of lawlessness on certain Indian reservations and the method chosen was selected because it was the cheapest solution. The problems of lawlessness and finances are magnified in the liquor field. Crowley v. Christensen, supra, 137 U.S. at 91. If law and order had broken down in Indian country while liquor prohibition was in effect, and Congress

intended to reduce its expenditures in Indian country, it simply does not follow that liquor regulation could be maintained in Indian country once prohibition was removed. The problem of lawlessness would increase once liquor was legalized with the inevitable result that without additional federal funds, neither the tribes nor the United States government would properly enforce state liquor laws.[11]

That it was Congress' intent to decrease the federal role in this area, not increase it, may be discerned from the reference in § 1161 to 18 U.S.C. § 3113. Section 3113 gives certain persons in federal service search and seizure power if there is probable cause to believe any person is about

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11. It is interesting to note that the Mazuries operated the Blue Bull without a tribal license for one year before the United States acted. United States v. Mazurie, supra, 419 U.S. at 548.

to introduce liquor into Indian country in violation of law. Clearly this statute is an investigative tool to enhance the law enforcement capability of those persons charged with enforcing federal prohibition. If the states were to be excluded from enforcing their own laws, and that responsibility were to remain with the United States, it is logical to assume Congress would have intended that these officials retain their search and seizure powers. By making §3113 inapplicable, Congress in §1161 demonstrated its desire that federal officials no longer investigate liquor traffic in Indian country if such traffic is in conformity with state and tribal laws. This view further suggests that the states and the tribes are the ones to determine conformity with their respective laws.

Assuming some type of law enforcement could be maintained, how would it

work? There is no mechanism for determining which state laws must be followed once a definition of state substantive standards is given. Nor is there a suggestion as to who is to make these decisions - the federal government, the tribes, the federal judiciary, or the states. Once it is determined which laws apply, the question arises regarding enforcement. Again, the Court of Appeals leaves this open. Under California law, the Department is given the primary responsibility of enforcing the Alcoholic Beverage Control Act. Where alcoholic beverages are sold in Indian country to non-Indians or are sold by non-Indian lessees on Indian lands to non-Indians, must California now look to the tribes for proper enforcement for the states substantive standards? If the tribes fail in this responsibility, the states are left unprotected. The Court of Appeals held the

states could not sue the tribes and there is a real question as to whether the federal government would step in to fill this void.

The only federal mechanism for enforcing states standards is through a federal prosecution. See United States v. Mazurie, supra, 419 U.S. 544. Thus, a state which detects violations of its state substantive standards must obtain investigative services from federal agencies, prosecutorial services from a local United States attorney, and the cases must be brought in federal courts.

Further, it is virtually impossible to regulate an industry such as the liquor industry solely under criminal laws. The Court of Appeals' decision anticipates the criminal law as the sole method for enforcing substantive state standards. A complex regulatory scheme has been created by California, with the threat of sanctions

against the license the most effective and common method for insuring complaints (see §§ 24200 et seq) with the aim of the system being protection of the public (see § 23001).

In contrast, criminal laws are obviously designed for a different purpose, to punish. If the goal of regulation were simply prohibition of liquor in Indian country, as was the case from 1832 until 1953, criminal penalties would work. They do not when strict regulation is required. The criminal system operates too slowly and cannot adapt to the ever-changing market place in the same manner an administrative agency can. There is no rule-making power delegated to any agency which can act on behalf of the People in the manner the Department may. Moreover, criminal penalties may be wholly inappropriate in many situations where violations are slight. For example, a licensee who permits nude dancing

may and should have action taken against his license (California v. LaRue, supra, 409 U.S. 109) but whether such conduct should be punished criminally is certainly debatable.

In light of the foregoing problems, the opinion of the Court of Appeals should be rejected. In its place should be a construction which allows state regulatory laws to be applied to the same extent in Indian country that they apply elsewhere in the state, and allow tribal law to be applied concurrently with them. Concurrent operation of laws of different sovereignties is a common occurrence in this country and should work equally well in this case.

This is particularly true here. Although an Indian retailer may operate his establishment in Indian country, the effect of the transaction may well be felt outside the country. In a heavily populated state like California, Indian tribes are not

necessarily located in isolated. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one half of the entire city, with the Indian lands interest first among non-Indian lands in a checkerboard pattern. Agua Caliente Band of Mission Indians v. County of Riverside (9th Cir. 1971) 442 F.2d 1184, 1185. Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet in Indian country will be non-Indian. There is absolutely no reason why state licensing laws should be applied on one side of the street in Palm Springs and not be allowed to apply on the other side simply because the latter is Indian country. Congress did not so intend and the court should not construe the statute to reach this result.

* * * * *

II

THE TWENTY-FIRST AMENDMENT OF ITS OWN FORCE REQUIRES THAT STATE LICENSING LAWS APPLY TO LIQUOR TRANSACTIONS IN INDIAN COUNTRY

A. Introduction

To this point, we have urged that section 1161 should be construed to permit all state laws, including its licensing laws, to apply to liquor transactions in Indian country. In this section, it is urged that even if section 1161 does not require that liquor transactions in Indian country must conform to all state laws, including its licensing laws, such laws must be satisfied by virtue of the state's police powers as protected by the Twenty-first Amendment. The Court of Appeals rejected this argument. (Petn. Append. pp. A-30 - 32.)

At the outset, the competing interests, and their underlying bases, should be delineated. With respect to the states,

their traditional powers to regulate liquor traffic within their borders, augmented by the Twenty-first Amendment has already been discussed. Furthermore, some state laws have been applied to acts or transactions within Indian country even without constitutional authority such as the Twenty-first Amendment. See Washington v. Confederated Tribes of the Colville Indian Reservation, supra, 447 U.S. 134; United States v. McBratney (1882) 104 U.S. 621.

Authority for Congress to regulate liquor in Indian country and therefore prohibit Indians from liquor consumption is found in part in the power of Congress to regulate commerce with Indians and in part in the relationship established between the federal government and tribal Indians. United States v. Nice (1916) 241 U.S. 591, 597; Perrin v. United States, supra, 232 U.S. 478, 482-485; Kennedy v. United States (1924)

265 U.S. 344, 345. See also McClanahan v. Arizona State Tax Comm'n., supra, 411 U.S. 164, 172 n. 7. Although there has been a geographical component to the exercise of that power, it has been incident only to the presence of Indians and their status as wards of the government. Hence, the prohibition against introduction of liquor into Indian country in the past could not go beyond that which was reasonably necessary to their protection. Perrin v. United States, supra, at 486. In other words, it is the Indian people, not places, which Congress protected by federal prohibition. But by enacting § 1161 in 1953, Congress removed its protection over Indians from liquor and in effect, left the matter of their protection in the hands of state and tribal governments.

It is against this background that we examine the relationship between the states and the tribes.

B. The Right Of The States To Regulate Liquor Traffic Within Their Borders Outweighs The Right Of Indians To Make Their Own Laws And Be Ruled By Them

Because Congress has not expressly stated in § 1161 that state licensing laws, could not apply to liquor traffic involving Indians or Indian country, state action can be prevented from applying if it ". . . infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee (1959) 358 U.S. 217, 220.

On the historical level, while the states have been regulating liquor traffic within their borders since colonial times, the tribes have had no history at all regarding the regulation of liquor traffic. Until 1953, federal and state prohibition was the only law on the subject. Thus, there were no Indian laws concerning liquor regulation and liquor regulation short of

prohibition has never been a part of tribal government. Compare Williams v. Lee, supra, 358 U.S. at 221-222; Fisher v. District Court (1976) 424 U.S. 382, 386-387. If state licensing laws under § 1161 do not apply, Indians are still bound to conform to other state laws, so to that extent, tribal authority is reduced. Finally, even in the Pala Band of Mission Indians' ordinance permitting liquor traffic on the reservation, such traffic must conform to state laws. (J.A. p. 24.)

Regardless of the historical perspective, however, the policy of allowing Indians to make their own laws and be ruled by them must give way when it conflicts with the authority vested in the states by the Twenty-first Amendment to regulate liquor traffic. Although the view of the early cases that the Twenty-first Amendment allowed the states to act ". . . unfettered by the

commerce clause" (Ziffrin, Inc. v. Reeves, supra, 308 U.S. 132, 138) has given way somewhat, it nevertheless remains a very strong force which will yield only in the most exceptional of circumstances.

For example, when the United States exercises jurisdiction over its real property and instrumentalities such as national parks or military reservations, state liquor laws will not apply. Collins v. Yosemite Park Co., supra, 304 U.S. 518, 538; United States v. Mississippi Tax Comm'n (1973) 412 U.S. 363; United States v. Mississippi Tax Comm'n (1975) 421 U.S. 599.[12/] This is not the case

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12. The citation by the Court of Appeals to this case is puzzling. This court there agreed that the facilities taxed (post exchanges, ship's stores and officer's clubs) were "'arms of the government deemed by it essential for the performance of governmental functions . . .'" (Id. at 606) and therefore immune from state taxation as federal instrumentalities (Id. at 610). This reasoning does not apply to Indian cases. Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 150, 154-55.

here; Congress' power to regulate liquor traffic in Indian country stems from its power over Indian people and their affairs, not their land or instrumentalities.

The Twenty-first Amendment has also yielded when it conflicted with the equal protection clause (Craig v. Boren, supra, 429 U.S. 190, 204-210), the due process clause (Wisconsin v. Constantineau (1971) 400 U.S. 433, 436-437), the Import-Export clause (Dept. of Revenue v. Beam Distilling Co. (1964) 377 U.S. 341, 343-346, and the Sherman Act, enacted under Congress' power under the Commerce Clause (California Liquor Dealers v. Midcal Aluminum (1980) 445 U.S. 97, 106-114).

However, where the authority vested in the states under the Twenty-first Amendment is measured against the right of tribes to govern themselves concerning liquor traffic, the Twenty-first Amendment must

prevail. California v. LaRue, supra, 409 U.S. 109; New York State Liquor Authority v. Bellonia (1981) 452 U.S. 714; Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 42-49; Ziffrin v. Reeves, supra, 308 U.S. 132; State Board of Equalization v. Young's Market Co., supra, 299 U.S. 59. Proper regulation of liquor-related activities are simply beyond the control of tribes. Problems caused by liquor consumption often go well beyond Indian reservations, both geographically and socially, such as sales to non-Indians, drunk driving, alcohol abuse, and criminal activities. Liquor traffic is not like traffic in food or clothes; its regulation requires a much larger perspective than the one which necessarily would be used by a tribe. The Twenty-first Amendment, therefore, should be construed to permit the states to exercise the proper authority over liquor traffic within their borders.

C. Application Of State Liquor Licensing Laws Under The Twenty-First Amendment Is Not Preempted By Federal Law

It has been held that some state laws have not applied in Indian country where the exercise of state authority has been preempted by federal law. White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142. In the cases where preemption has been found, the basis for that finding has been a system of laws, regulations, and federal-tribal relationships which has convinced the Court that there is no room for state laws imposing additional burdens. White Mountain Apache Tribe v. Bracker, supra,; Central Machinery Co. v. Arizona Tax Comm'n (1980) 448 U.S. 160, 163-166; Warren Trading Post v. Tax Comm'n (1965) 380 U.S. 685.

There is no equivalent system with respect to liquor traffic. Certainly the

Indian trader statutes do not provide a sufficient basis for a finding of preemption. Those statutes were enacted at a time when liquor prohibition and Indian country was the rule and clearly are insufficient to provide for regulation of liquor activities. They do not even cover sales to non-Indians. See 25 U.S.C., §§ 261-264. Since prohibition was conditionally lifted in 1953, Congress has not amended any of these statutes to reflect this change. Similarly, regulations promulgated by the Secretary of Interior provide for no regulation over liquor traffic in the same manner that the states or the United States (see 27 U.S.C. §§ 201 et seq.) have. 25 CFR, §§ 251.1 et seq.[13/] Indeed, although nearly 30 years have passed since prohibition in Indian country has been

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13. It should be noted that the punishment provisions for failure to obtain a license applies only to non-Indians. 25 CFR, § 251.3.

repealed, the Secretary has failed to enact any regulations of the kind necessary to properly regulate liquor traffic. Compare 36 CFR, § 5.2 (regulation of liquor traffic in national parks; 27 CFR, subchapter A (permit requirements under the Federal Alcohol Administration Act). The failure of the Secretary to enact such regulations strongly suggests the Secretary holds the belief that the states are ones to regulate liquor traffic. Finally, there has been nothing in the way of a federal-tribal relationship which would suggest that there has been a federal policy to allow tribes to regulate and profit from liquor traffic to the exclusion of the states. Compare White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 149.

This court has said that in an Indian preemption case, although an express congressional statement of preemption is not

required, ". . . any applicable regulatory interest of the State must be given weight (citation omitted) and 'automatic exemptions "as a matter of constitutional law"' are unusual." Id. at 144. In this case, there is no express congressional statement preempting state law; on the contrary, Congress has declared in § 1161 that liquor transactions must conform to state law. So has the applicable tribal ordinance. The area involved is liquor traffic, an area traditionally occupied by the states not the federal government, and specifically reserved to the states by an amendment to the United States Constitution. Application of state law does not stand as an obstacle to the objectives of § 1161. See generally Florida Lime and Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132, 141-46. Under these circumstances "a clear and manifest purpose of Congress" (Jones v. Rath Packing Co.

(1977) 430 U.S. 519, 525) to preempt should be required before the states' authority is superseded, and no such purpose exists here. Since there is no bar to the exercise of the state's authority under the Twenty-first Amendment, state licensing laws should apply to liquor transactions in Indian country.

* * * * *

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court dismissing the complaint should be affirmed and the decision of the court of appeals, which denied to California the authority to license a tribal member who desires to engage in liquor traffic on a reservation, should be reversed.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ALAN S. METH,
Deputy Attorney General

By
ALAN S. METH,
Deputy Attorney General

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

NO. 82-401, October Term 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA REHNER,

Respondent.

CERTIFICATE OF SERVICE

I, Alan S. Meth, the Attorney of record for Baxter Rice, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of December, 1982, I served copies of On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner's Brief on the Merits on the parties thereto, by depositing in the United States mail three copies thereof, with first-class postage prepaid, in an envelope addressed to each attorney of record, as follows:

ART BUNCE
CHARLES SCOTT
GEORGE FORMAN
BRUCE FRIEDMAN
California Indian Legal Services
Post Office Box 2457
Escondido, California 92025

It is further certified that all parties required to be served have been served in accordance with Supreme Court Rule 28.

Alan S. Meth

ALAN S. METH
Deputy Attorney General
Attorney for Petitioner

A-1

HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Subcommittee on Indian Affairs

- - - - -

H. R. 1055

Washington, D. C.

March 18, 1953

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H.R. 1055

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WEDNESDAY, MARCH 18, 1953

House of Representatives,
Subcommittee on Indian Affairs of
the Committee on Interior and Insular
Affairs,
Washington, D.C.

The subcommittee met, pursuant to other business, Honorable William H. Harrison (chairman) presiding.

Mr. Harrison. We will take up H.R. 1055, a bill by Mr. Patten, To terminate Federal discriminations against the Indians of Arizona.

The bill will be inserted in the record at this point.

(H.R. 1055 reads as follows:)

83d CONGRESS
1st Session

H. R. 1055

IN THE HOUSE OF REPRESENTATIVES

January 6, 1953

Mr. Patten introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To terminate Federal discriminations against the Indians of Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, wherever the phrase "Federal laws discriminating against Indians" is used in this Act, the phrase shall be construed to include the following and only the following provisions of law: Revised Statutes,

sections 467 and 2136, 25 United States Code, section 266; Revised Statutes, section 2138, as amended, 18 United States Code, section 1157; Revised Statutes, section 2135, 25 United States Code, section 265; Revised Statutes, section 2139, as amended, 18 United States Code, sections 1154 and 1156; and section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U.S.C., sec. 195); all of the said laws being laws which forbid the sale, purchase, or possession by Indians of personal property which may be sold, purchased, or possessed by non-Indians.

Sec. 2. That the said Federal laws discriminating against Indians shall not hereafter apply to any act or transaction within the State of Arizona outside an Indian reservation which is in conformity with the laws of Arizona.

Sec. 3. That the said Federal laws discriminating against Indians shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation.

Sec. 4. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the Constitution of Arizona, if the people of Arizona shall duly adopt a constitutional amendment repealing the aforesaid paragraphs.

Sec. 5. It shall be the duty of the Secretary of the Interior to cause to be published in the Federal Register any ordinance duly adopted by any Indian tribe or tribes in the State of Arizona which authorizes the sale, purchase, or possession by Indians on that reservation of

personal property which may be sold, purchased, or possessed by non-Indians outside of Indian reservations.

Mr. Harrison. We will ask Mr. Rhodes from Arizona if he will explain the bill.

STATEMENT OF HONORABLE JOHN J. RHODES, A REPRESENTATIVE IN THE CONGRESS FROM THE STATE OF ARIZONA

Mr. Rhodes. Mr. Chairman, before I proceed, I would like to ask if Mr. Patten was notified that the bill would be coming up for hearing and given the opportunity to attend.

Mr. Harrison. I assure you he was, Mr. Rhodes.

Mr. Rhodes. Thank you very much. I just wanted that to show on the record.

This bill was introduced by my colleague from Arizona, Mr. Patten, to terminate Federal discrimination against the Indians of Arizona. There are certain laws, which it is felt by the author of the

bill and by me, that are very discriminatory and are unnecessary insofar as the operation of the Indian population of the State of Arizona is concerned.

One of these bills has to do with the sale of liquor to Indians. I know that that is a very controversial subject.

I do know, however, of my own knowledge that every responsible person who has dealt with the Indians of Arizona believes that the continued prohibition of the sale of legal liquor to these Indians is detrimental to the Indians. You have a situation where an Indian, if he desires to have a drink of liquor, has to pay any number of prices for the liquor, or he has to make it himself; and some of the potions which come out of these tribal stills are rather amazing in their permanent effect on the individual.

Further, the Indian, when he buys a bit of liquor, is almost in the same situation that perhaps a few other people were in during the days of prohibition when, as soon as the bottle came into one's hands, it was immediately consumed before somebody came around and took it away. And the result has been drunkenness among the Indians, which is I think almost directly caused by the existence of this particular law.

I believe it would be very harmful to the Indian population to have it continued.

The other provisions of the bill are almost identical with the bill of Mr. D'Ewart which is not before the committee for consideration, and if Mr. D'Ewart's bill is passed as it is now written, without amendment striking out the various statutes involved in there, it would take care of the Patten Bill except for one

instance, which also has to do with the liquor situation.

When the State of Arizona was admitted to the Union, the enabling legislation provided there would be included in the Constitution a provision that no sale of liquor would be made to an Indian; and the further provision that in the event that any Indian land was sold, for 25 years thereafter no liquor would be sold on that particular land. Those provisions are now in the Constitution of Arizona, and they cannot be removed without an Act of Congress which authorizes the removal thereof.

This would, in effect, amend the enabling act of the State of Arizona to allow the State to amend its Constitution to remove these provisions which we believe are completely discriminatory.

Mr. D'Ewart. Would you yield there?

Mr. Rhodes. Yes, I would.

Mr. D'Ewart. Would you object to amending this bill to strike out the reference to the State of Arizona except in section 4, which has to do with the enabling act?

Mr. Rhodes. I would not. I would be very happy to accept that amendment.

That is the sum of my presentation, Mr. Chairman, unless there are questions.

Mr. Harrison. Any questions of Mr. Rhodes?

Mr. Myer, do you want to make any statement on H.R. 1055?

Mr. Myer. I would be glad to, Mr. Chairman.

Mr. Harrison. I thought I recalled a report, but I do not see one now.

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Mr. Myer. I thought I gave you a copy. I have my copy here, but I thought I gave you the extra copy.

Mr. Harrison. Yes, here it is. I found it.

STATEMENT OF DILLON S. MYER, COMMISSIONER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Myer. Mr. Chairman, again I would like to state my report has not cleared through the channels and has not been approved by the Bureau of the Budget as yet.

Mr. Harrison. The report will be made a part of the record.

(The report referred to is as follows:)

Mr. Myer. I recommend that the bill be enacted if its title and text are

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amended to conform to the enclosed draft, which I will present to you a little later.

There are six statutes that are defined in section 1 of the bill as "federal laws discriminating against Indians.

"Two of the statutes, 18 U.S.C.A. 1154 and 1156, relate to the sales of intoxicants to Indians, and the introduction and possession of intoxicants in the Indian country. Two of the statutes, 25 U.S.C. 265 and 266, relate to the purchase or pledge from an Indian within the Indian country of articles used in hunting, implements of husbandry, cooking utensils and clothing, and the sale of arms or ammunition in country occupied by hositle or uncivilized Indians. Two of the statutes, 25 U.S.C. 195 and 18 U.S.C.A. 1157, relate to the sale or disposition of livestock issued to or

purchased for Indians by the United States."

Now, without reading further, may I summarize our position on the bill, and then I would like to read into the record out proposed redraft covering these points.

We are completely in agreement that the statutes relating to intoxicating liquors in Indian country should be eliminated as discriminatory. This bill, unfortunately, does not cover all the statues, so that our redraft would include these two, plus additional paragraphs that we feel should be revised.

Secondly, we are in thorough agreement, and our redraft will so indicate, that the statutes 25 U.S.C. 265 and 266 should be withdrawn from the statute books.

Thirdly, we have the same argument with the item regarding disposition of

livestock which we discussed the other day in relation to Mr. D'Ewart's bill on 18 U.S.C. (a) 1157, which we would like to have eliminated from this bill at this time, at least until further study can be made of it, for the simple reason that it does have to do with not only the supervision of trust property, which is livestock held in trust, it does affect to some extent loans and credit operations that have been carried on in the past in regard to these properties. It has enforcement clauses in the bill which, if eliminated, we believe would weaken our position from the standpoint of the management of those properties.

May I hurry on to say that we are trying very hard, and making quite a little progress, I think, to get out of the business of having cattle held in trust. We think we should do so. And, of course,

if they were not in trust, this bill would not affect them anyhow.

What 1157 briefly does, as was read into the record the other day, it provides that any property held in trust cannot be sold without the approval of the superintendent, and if it is sold, it makes both the seller and the buyer liable.

Now with that general comment, I would like to read into the record, Mr. Chairman, a rather simple version of the kind of bill that would cover all of these points, I believe.

Title -- "To eliminate certain discriminatory legislation against Indians in the United States."

I forgot to mention that we would like to broaden the bill to cover the whole country, and this title would so indicate.

"Be it enacted by the Senate and House of Representatives of the United

States of America in Congress assembled, that Chapter 53 of Title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding Section 1151 of such title the following new item:

"'1163. Application of Indian liquor laws.'

"Section 2 Title 18, United States Code, is hereby further amended by inserting in Chapter 53 thereof immediately after Section 1162 a new section, to be designated as Section 1163, as follows:

"'1163. Application of Indian liquor laws.

"'The provisions of Sections 1154, 1155, 1156, 3113, 3488, and 3618 of this Title, and the provisions of Section 2141 of the Revised Statutes (25 U.S.C., sec. 251), shall not apply within any area that is not Indian country, nor to any act or

transaction within any area of Indian country over which the State lacks full criminal jurisdiction that is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.'

"Section 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

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"Section 4. Section 2135, Revised Statutes, 25 United States Code, section 265, is hereby repealed.

"Section 5. Sections 467 and 2136, Revised Statutes, 25 United States Code, section 266, are hereby repealed.

"Section 6. Section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U.S.C. 195) is hereby repealed."

That ends the proposed bill.

Mr. Rhodes. Mr. Chairman, might I ask that copies of that be made available to the Members of the committee?

Mr. Harrison. I think that would be well to have the staff make copies so the Members of the committee would have the proposed substitution to the bill.

The author of the bill is here now. Mr. Patten, would you like to make a statement on the bill?

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Mr. D'Ewart. I wonder if it would be a good idea to have this explanation, and then Mr. Patten's comments.

Mr. Patten. I would like to hear this too.

Mr. Harrison. Go ahead, Mr. Myer.

Mr. Myer. I think it is probably rather clear -- I have already stated what we would propose to do in this bill, but I did want to comment on this rather long section 2.

What it does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, and provide for tribal ordinances in case they do not want liquor on the reservation areas, where the state laws do not apply.

I think it is a pretty thorough job of going into the whole liquor question to eliminate those provisions we are trying

and would like to have eliminated as far as we are concerned.

Now the rest of them go to the points we have already covered.

As I remember, the number section here is simply a matter of codification to get things in line so we could do this job.

The other sections have to do with the repeal, as was proposed in the original bill, of sections 265 and 266 and 195.

I think that is all I have to say, Mr. Chairman.

Mr. Haley. Mr. Chairman?

Mr. Harrison. Mr. Haley.

Mr. Haley. You referred particularly to just two States who would have to amend their constitution.

Mr. Myer. I intended to mention that. It so happens that both Arizona and New Mexico passed their constitutions later than some of the other States, and as far

as I know, they are the only two States that have provisions of this kind in their constitution. That was done pursuant to Federal law and, I believe, to provisions that authorized the State to be established. So that is the reason why these two States are mentioned.

Mr. Haley. And that is the only two?

Mr. Myer. The only two to our knowledge. I think both of them developed their constitution and became States, as I remember it, in 1912, and both of them did have provisions in their constitutions pursuant to the general pattern of the U.S. laws, and this would give them authority as far as the United States is concerned to change them if they wish to do so.

Mr. Shuford. Mr. Chairman?

Mr. Harrison. Mr. Shuford.

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Mr. Shuford. Would it not be wise to put in the bill "or any other State that has such a provision"?

Mr. Myer. I certainly would have no objection to that and would be very happy to agree to such a proposal.

Mr. Harrison. Mr. D'Ewart.

Mr. D'Ewart. I have a question as to the applicability of the repeal of Indian liquor laws. It says "shall not apply within any area that is not Indian country."

You know Indian country is defined as within the boundaries of reservations. You say "shall not apply within any area that is not Indian country". That means shall not apply, this repeal of Indian liquor laws, to all of the United States outside the boundary of an Indian Reservation. Is that what you want to do?

Mr. Myer. No, that is not what is intended, I believe.

Mr. D'Ewart. (Reading) "Shall not apply within any area that is not Indian country."

Mr. Myer. Well, the reason I believe that is in here -- and I am a little lame here, and I will have to admit that I may have to double check for you -- I believe that this has to do with the fact that the Indian liquor laws generally do apply to Indian country, and I think that we are trying to avoid affecting anything that relates to statutes that might affect this general pattern.

Now, Mr. D'Ewart, I would prefer to check this matter with the gentleman who wrote this bill a little further, if you do not mind.

Mr. D'Ewart. Because it is against the law to sell an Indian liquor in

the District of Columbia under Federal Statutes.

Mr. Haley. I think it is also true in the State of Florida.

Mr. Shuford. Do you not think this should provide in there it would not affect any of the statutes of the individual States?

Mr. Myer. We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided.

I have been informed -- and I did not see this report until last night, and it was rather late when I read it, and I did not have much time this morning, and I did not raise that question -- but I have been advised that this report is intended to eliminate all of the sections in the statutes which discriminate against Indians and at the same time not interfere with

State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law.

Mr. Rhodes. Mr. Chairman?

Mr. Harrison. Mr. Rhodes.

Mr. Rhodes. You did not have anything in your bill concerning the sale of cattle, did you, Mr. Myer?

Mr. Myer. I proposed that we eliminate from this bill section 1157, which was discussed at some length the other day, in connection with a similar bill that Mr. D'Ewart had.

Mr. Rhodes. As I recall, you were going to get a policy determination from the Department on that.

Mr. Myer. That is right. We have reviewed that matter quite thoroughly, and we find there is still quite a large number

of cattle owned in trust, and also there are many loan agreements in effect at the present time which might be affected if this law was repealed, on trust cattle in this stage in the game.

I have already reported to Mr. D'Ewart earlier this morning if 1157 were to be left in, we would like time, at least which I have not had, to prepare a proposed amendment that would eliminate its effect upon the present loan agreements and give a period of time as regarding any trust cattle that are now trust cattle, where we can work out a program of gradual adjustment with those poeple.

It will be a little intricate to work out, but I think it can be done.

I did not get the summary memorandum -- again, I read it last night and was able to talk to Mr. Huber only briefly about it this morning.

Mr. Rhodes. I take it, then, your position, whereas it was unofficial before, is now the Departmental position on this?

Mr. Myer. I frankly have not discussed this further with the Department. I was simply going to get further information as to the possible volume of trust cattle, and how it would affect it, as I remember it. I did not discuss this bill with the Departmental officials. I did ask them to review two other bills important here, and I was notable to get their final answer on it before I came up here this morning.

Mr. Rhodes. Then this is --

Mr. Myer. This is still an unofficial report on this bill.

Mr. Rhodes. Do you expect to get an official policy from the Department on this matter?

Mr. Myer. This report will be reviewed by the Department and by the Bureau of the Budget before it comes to you officially yes. It will have to be. This is the normal process, and it is to be for the Department at the present time.

Mr. Harrison. Mr. Patten.

Mr. Patten. Mr. Commissioner, is it not a fact that you are overlooking one thing? Under the present statutes an Indian cannot go off the reservation and, even though he has the ability to run cattle or farm land, lease land individually by himself.

Mr. Myer. Sure he can.

Mr. Patten. That is one angle to your question I think you overlooked. I think we would be in agreement if you could sustain your present loan agreements and allow him to go off the reservation.

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Mr. Myer. An Indian can go anyplace he wants to go. We are not making credit loans out of our revolving loan funds all over the United States because it would be impossible to administer. But that is the only reason. There is no limitation on the Indians going off the reservation, setting up in the cattle business and getting credit from the banker whereever he can get it. But there is no provision in our credit setup for supervising credits scattered out away from the reservation, because it is too costly a process for us to administer.

Mr. Patten. Is there not a Federal statute that you cannot buy cattle from Indians?

Mr. Myer. None that I know of, sir.

Mr. Patten. That is what we are trying to repeal, is it not, 1157?

Mr. Myer. I think you will find 1157, which was read into the record the other day -- and I will be glad to read it again if you wish to have me do so -- simply provides that if the cattle are, as are many Indian lands, it would require the authorization of the superintendent to sell them.

Mr. Harrison. I understand Mr. Cohen has a statement he would like to make on this bill, H.R. 1055. Mr. Cohen.

STATEMENT OF FELIX S. COHEN, ATTORNEY, SAN CARLOS APACHE TRIBE OF ARIZONA, HUALAPAI TRIBE OF ARIZONA; GENERAL COUNSEL, THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Mr. Cohen. Mr. Chairman, my name is Felix S. Cohen, and I appear here as attorney for the San Carlos Apache Tribe of Arizona and for the Hualapai Tribe of Arizona and also as General Counsel for the

Association on American Indian Affairs, of which Mr. Oliver La Forge of Santa Fe, New Mexico, is chairman. And I appear in support of H.R. 1055.

May I call the committee's attention, in the first place, to the fact that an identical bill was before this committee and is reported in the Congressional Record of May 8, 1952. In that report the following statement appears:

"Representative Patten, who introduced the three measures in the House, explained their objectives. Other witnesses who testified on behalf of the proposed legislation were Thomas C. Segundo, Chairman, Intertribal Council, Arizona; Clarence Wesley, Chairman, and Jess Stevens, Vice Chairman, both of the San Carlos Apache Tribal Council; Royal Marks, Arizona attorney; Felix Cohen, attorney,

Washington, D.C.; and I. W. Flood, business agent, Salt Riva Pima, Maricopa County, Arizona."

So far as I know, the tribes of Arizona which have joined in the Intertribal Council of Arizona are unanimously in support of this bill.

The Association on American Indian Affairs has testified in support of this bill and, I believe, has sent a telegram to the Chairman within the last day or two in support of this bill.

I should say that the Association on American Indian --

Mr. D'Ewart. Did you say it would also meet with the requirements of the requests of the Blackfeet?

Mr. Cohen. We are talking here about the Arizona bill, but certainly the Blackfeet Tribe and, I believe, all the tribes of Montana, the Intertribal Policy

Board have expressed themselves in support of this legislation, and also the Montana Legislature in House Joint Memorial No. 5, passed, I think, about two years ago, has gone on record in support of this legislation.

I think in view of the statements that have been made this morning there is no need to argue about the principles involved. I think we are all in favor of the principles of this legislation, and I think basically there is no substantial difference in purpose between the Members of the committee here, the Indians, and the Indian Bureau.

There are differences, however, in the scope and phrasiology (sic) of the legislation and in the question whether this legislation should be adopted as a whole or whether it should be broken into

pieces, perhaps, and some parts of it left for other consideration.

Now perhaps the most serious point of difference is in connection with the matter of the sale of cattle. The Indians feel that is a very serious discrimination, not only as a matter of principle, but an interference with their business, and many Indians are in the cattle business. It is their chief business. And they feel it is a very serious interference with their free enterprise and with their cattle business to have to go to the Indian superintendent for permission any time they sell a cow or a horse or a pony, even though the livestock is not trust livestock, even though they have paid back to the Government every dollar of any loan mortgage they may have borrowed from the Government on that livestock.

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If, as Comissioner Myer suggested, this bill, as he believes, were limited to trust property, I do not believe any of the Indians that I represent would object to it, but the law as it now stands is not limited to trust property.

The law as it now stands says very definitely: "Where restricted Indians" -- that is a technical word. It ordinarily means an Indian with an inalienable allotment of land. But a restricted Indian may have unrestricted property. The money in his pocket and the horses and cows and furniture in his house may be unrestricted.

"Where restricted Indians are in position or control of livestock, purchased for or issued to them by the Government.

Let me explain that phrase. In the old days Indian money was generally held by the superintendent and spent for the Indian by the superintendent. The

superintendent would go out and buy a team of horses or some breeding stock and turn it over to the indian. It does not mean that this is Government property. It does not mean that the government ever had any lien or mortgage over the property. It just means as a matter of doing business the superintendent went out and bought the livestock for the Indians.

Now it says, "Where restricted Indians are in possession or control of livestock, purchased for or issued to them by the Government, or the increase therefrom" -- and I take it that means down unto the seventh generation. I take it the Government pays the Navajo Indians under its obligation to the Navajo Indians under the early treaty, in the form of sheep, can still say that the increase of those sheep -- 7 or 800,000, I believe, now on the Navajo Reservation -- are the increase of

livestock which were purchased for or issued to Indians by the Government. The Indians do not owe the Government anything on those sheep, they belong to the Indians. But I believe as the statute reads, and as it is interpreted, they come under the statute. And the statute says that as to such livestock "or the increase therefrom, shall not be sold, transferred, mortgaged, or otherwise disposed of except with the consent in writing of the superintendent or other officer in charge of the tribe."

And then it goes on to say not only may it not be sold, but such livestock may not even be removed from the reservation.

The man who wants to drive his team off the Papago Reservation to a water hole on the outside, if the ancestors of that team were Government issue or purchased by the Government out of Indian

funds, may not do so, as I read the statute, without the permission of the superintendent.

Now I do not say that statute is enforced to the hilt today. Certainly, like some of the other statutes referred to in this bill -- the ammunition statute and the statute which makes it a crime or an offense for a white man to buy clothing or implements from an Indian -- those things are not fully enforced. But there is enough uncertainty in the air and there is enough difficulty and possibility of enforcement so that the Indian who is in the cattle business operates under a peculiar and unjustifiable paternalistic restriction, and we think, therefore, at least speaking for the Indians that I represent, that this restriction is just as unjustified as the restriction on the

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purchase of ammunition or the sale of clothing or the sale of liquor.

Now one minor point in connection with the proposed revision of the provisions dealing with liquor, suggested by Commissioner Myer. I certainly have no objection to Commissioner Myer's suggestion that the provisions be amplified so that all of the liquor provisions are included, but I do have some serious question not as to purpose but as to phrasiology (sic) with respect to section 1155, which the Commissioner suggests should be added to the bills that this bill would repeal.

That refers to intoxicants dispensed on school sites, and it says, "Whoever on any tract of land in former Indian country, upon which is located any Indian school maintained by or under the supervision of the United States, manufactures, sells, gives away, or in any

manner or by any means furnishes to anyone, either for himelf or for another, any vinus, spirituous, malt fermented liquor" and so on.

I have some serious question as to whether school property should be subjected, so far as the Federal Government is concerned, to the sale of liquor.

Now the Commissioner may very well say that should be covered by State law, and perhaps it is. On the other hand, when a matter of this sort comes up on the Floor of Congress for discussion and somebody asks the sponsor of the bill, "Does this as far as the Federal Government concerned legalize the sale of liquor in Indian schools?" I think the sponsor would have to say yes.

I would prefer not to see that provision not covered in this bill.

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I do not think it is a matter of discriminating against Indians because this does not discriminate against Indians, this merely says a certain type of property, a particular kind of federal school property shall not be used for the sale of liquor or the manufacture of liquor. And there are similar statutes, ordinances, elsewhere, which apply equally to the Indian and white man.

I should like to say, by way of correction of one of the statements that was made earlier, that section 1154, which is the main Indian liquor statute at the present time, although it has the title "Intoxicants dispensed in Indian country" is not limited to Indian country. That title is definitely misleading.

As Congressman D'Ewart very properly pointed, the present statute, section 1154, not only forbids the

dispensing of liquor in Indian country but also forbids the sale or giving away of liquor and various other kinds of specified products to any Indian to whom an allotment of land has been made, and so on, regardless of the place where that is done. And that seems to me to be most important of the current discrimination.

As I say, I do not think there is any real difficulty on principle here. It may be that the committee will want to work out in executive session the exact language of the provisions which would accomplish what we all have in mind there.

If there are any questions as to the bill or as to the position of the groups I represent, I will be glad to answer them.

Mr. Harrison. Do any Members of the committee have any questions they would like to ask Mr. Cohen?

Thank you, Mr. Cohen.

Mr. Cohen is the last witness who requested time on this particular bill. If there are no objections, I am going to ask that the sponsor of the bill get together with the Commissioner and see whether you can iron out the difficulties and return the bill to the committee for further action tomorrow morning, if possible.

Mr. Myer. May I take one moment to make a brief comment regarding the testimony of Mr. Cohen?

Mr. Harrison. If you make it very brief. I do not want to shut you off.

Mr. Myer. It will be very brief, I assure you.

First of all, on the comments regarding 1157, we have interpreted the restriction to mean property held in trusts, and I assure you that there is no intent on the part of the Indian Bureau or

the Department of Interior to construe that as literally as Mr. Cohen in his bloodcurdling statement as to what we might do, intended to do.

Now I want to repeat, as far as 1157 is concerned, we would be very glad, if you want to take the time to work it out, to see if we can work out a provision that would safeguard the loan agreements now in effect and the trust cattle now in effect and remove the word "revision" and all the rest of the section. That is number 1.

Number 2. I have no intention of recommending to this committee that we do the kind of job that will provide for sale of liquor on Indian school property, and I think Mr. Cohen knows that, and I think you know that. All we are trying to do is to try to clean up all the statutes, which I thought was what he wanted to do, that

have to do with Indians as versus other people in the United States. And that section is one of those that would have to do with that.

I have no objection if the committee sees fit to eliminate that particular statute from the provisions of the recommended bill that we have on the record.

Mr. Harrison. Thank you, Mr. Commissioner.

I would like to ask the indulgence of the Members of this committee to meet here tomorrow morning at a quarter of ten, rather than ten o'clock, for an executive session for 30 minutes on bills which we have discussed. At 10:15 H.R. 130 will be the first order of business, followed by H.R. 2231, H.R. 2976, H.R. 1383, if we can reach it. Those which are not reached tomorrow will be carried over until later.

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HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

Subcommittee on Indian Affairs

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H. R. 1055

Washington, D. C.
May 6, 1953

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H. R. 1055

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WEDNESDAY, MAY 6, 1953

House of Representatives,
Subcommittee on Indian Affairs
of the Committee on Interior and
Insular Affairs,
Washington, D. C.

The subcommittee met at 10:15 a.m., pursuant to call, in the Committee Room, New House Office Building, Honorable Wesley A. D'Ewart presiding.

Mr. D'Ewart. The Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee will please come to order for the consideration first of H. R. 1055 by Mr. Patten, To terminate Federal discrimination against the Indians of Arizona.

Hearings have been held on this bill, witnesses have been heard, it is the intention of this committee to act as

though we were in executive session to take such action as the committee desires.

(H. R. 1055 is as follows:)

[Bill omitted in printing, see page A-3.]

Mr. D'Ewart. Mr. Rhodes, would you care to make a statement on this?

Mr. Rhodes. Mr. Chairman, of course, I made a statement when the bill was before the committee before. As the committee will recall, we reported out a bill which was introduced by the acting chairman which, I think, embodied part of the subject of the Patten Bill, and I do not know just right off hand which sections should be deleted. But the Patten Bill should be amended to strike out those sections which have been taken care of in the D'Ewart Bill, I would imagine.

For instance, we have in the Patten Bill various sections involving the sale of cattle and discrimination against Indians in the sale of personal property which were taken care of in the D'Ewart Bill.

Mr. D'Ewart. I have a report in my hand, not dated, not signed. So I take it

that is unofficial?

Mr. Sellery. Unofficial, yes, sir.

Mr. D'Ewart. (Reading) "I recommend that the bill be enacted if its title and text are amended to conform to the enclosed draft".

I have not seen the draft. Maybe we should have this report read to the committee. That is an unofficial report.

The Clerk. (Reading) "My dear Mr. Miller:

"Reference is made to your request for a report on H. R. 1055, a bill 'To terminate Federal discriminations against the Indians of Arizona'.

"I recommend that the bill be enacted if its title and text are amended to conform to the enclosed draft.

"Six statutes are defined in section 1 of the bill as 'Federal laws discriminating against Indians'. Two of the statutes, 18

U.S.C.A. 1154 and 1156, relate to the sales of intoxicants to Indians, and the introduction and possession of intoxicants in the Indian country. Two of the statutes, 25 U.S.C. 265 and 266, relate to the purchase or pledge from an Indian within the Indian country of articles used in hunting, implements of husbandry, cooking utensils and clothing, and the sale of arms or ammunition in country occupied by hostile or uncivilized Indians. Two of the statutes, 25 U.S.C. 195 and 18 U.S.C.A. 1157, relate to the sale or disposition of livestock issued to or purchased for Indians by the United States.

"I consider the laws which prohibit the sales of intoxicants to Indians as discriminatory but I believe these laws should be made inapplicable to transactions occurring outside of Indian country generally rather than only in Arizona. I

also believe that the laws should be made inapplicable to transactions occurring within the Indian country generally rather than only in Arizona if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to state law. In addition, there are statutes on the subject other than those contained in H. R. 1055. The enclosed draft includes these additional statutes and would make the bill of general application rather than restricting it to the State of Arizona.

"For many years there has been no need for the protection to both Indians and non-Indians which the statutes codified as 25 U.S.C. 265 and 266 were designed to afford. There are no longer any Indians or Indian tribes which are considered as uncivilized or hostile in the sense in which these words are used. The statutes,

therefore, are obsolete and, while I believe they should be repealed, I also believe the repeal should be general rather than restricted to Arizona. The enclosed draft would accomplish that general repeal.

"I do not believe that the statutes codified in 25 U.S.C. 195 and 18 U.S.C. 1157 should be construed as discriminatory against Indians. These sections prohibit the sale or other disposition of livestock purchased for or issued to Indians by the Federal Government, except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of such livestock belongs. The latter statute also requires that such livestock be branded with the 'ID' or reservation brand of the jurisdiction to which the owners of such stock belong.

"Title to the livestock to which these statutes refer is in the United States in trust for the Indian. Trust title is a privilege accorded Indians to assist in their economic development which exempts property so held from State taxation. Trust title to such property is not a mechanism for policing or restricting activities of Indians. In order to retain the privilege of holding title to livestock in trust, the owner is required to brand the stock 'ID' and to obtain permits to sell before disposing of the same. These are obligations which the Indians assume for the privilege of holding the stock in a trust status.

"Any Indian in possession of trust livestock against which there are no liens may request the superintendent to release the interests of the United States in such stock at any time, and superintendents are

under instructions to comply with such requests. Superintendents have also been instructed that Indians in possession of trust livestock against which there are no liens, who refuse to brand their stock "ID" or to obtain permits to sell, shall be given unrestricted title to such property. Employees of the Bureau of Indian Affairs have been instructed that Indians shall not be permitted to retain the privilege of having title to their livestock in trust, unless they conform to the requirements of branding and of obtaining permits to sell."

(The report in full is as follows:)

[Report of Secretary of Interior and Amendments Omitted]

Mr. Rhodes. Mr. Chairman, in order to save the time of the committee and obviate the necessity of reading this long report, it obviously will call for further extensive amendments to this act. Mr. Patten, the sponsor of the bill, is not in the city at the time, and I would prefer to have a copy of the report and take the matter up with Mr. Patten, then present amendments to the committee at a later date.

Mr. D'Ewart. I have a letter here dated May 6 addressed to Honorable William H. Harrison, Chairman, Subcommittee on Interior and Insular Affairs, Room 1324, New House Office Building, Washington, D. C. It is signed by A. B. Sieh, Secretary to Harold A. Patten, Member of Congress. It reads:

"My dear Mr. Harrison:

"Mr. Patten, who is detained in his

District on business, has requested that I, in his absence, submit the following telegram to be included in the record pertaining to hearings being held on H. R. 1055 to terminate Federal discrimination against the Indians of Arizona.

The telegram is as follows: 'Navajo Tribe united behind anti-discrimination bill passed by House yesterday provided measure repeals Indian prohibition. We understand bill as acted on by House may have eliminated liquor clause. Navajos believe equal rights also entitles us to legal glass of beer and we will oppose any anti-discrimination measure which does not face up realistically to liquor question. Appreciate latest information and your advice.

"'Sam Ahkeah, Chairman Navajo Tribal Council.'"

Now I might say that the "ID" concerning livestock was taken care of in former legislation, and I believe those provisions do not need to be considered at this time. That bill has passed the House and gone on. The only thing we are concerned with this morning is the liquor features of this bill.

Mr. Rhodes. Is there anything in the report concerning the liquor features?

Mr. D'Ewart. It was just handed to me a minute ago.

Mr. Sellery. The fourth paragraph of the unofficial report.

Mr. Aspinall. Off the record.

(Discussion was had outside the record.)

Mr. D'Ewart. On the record. H. R. 1055 will be considered as read and open for amendment.

Mr. Rhodes. Mr. Chairman, I have one

amendment I would like to offer, which is a subject a bit new. It refers to the Crow Tribe, and I would like to ask that the clerk read this amendment.

Mr. D'Ewart. The particular provision to which you refer is found in section 9 of the Act of June 4, 1920, an Act to provide for allotment of lands of Crow Tribe, and the particular provision of section 9 which is proposed to repeal reads as follows:

"Land within said reservation, whether allotted, unallotted or otherwise disposed of, shall be subject to all of the laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country unless otherwise provided by Congress."

That particular section provides only to the Crow Tribe, and if we do the job we hope to do, it will be repealed along with the other.

Mr. Westland. Federal law?

Mr. D'Ewart. Federal statute.

Mr. Rhodes. Do you have the citation, the U. S. Code?

Mr. D'Ewart. 41 Statute U.S.1.

Mr. Rhodes. What about the U. S. Code? The reason I ask, we have a draft of a bill here which includes sections of the Code which were not in the Patten Bill and not in your bill.

Mr. Aspinall. Off the record.

(Discussion was had outside the record.)

Mr. Aspinall. I make the motion.

Mr. Rhodes. Second.

Mr. D'Ewart. It has been moved and seconded that H. R. 1055 be reported favorably to the full committee with such amendments as are found necessary to carry out the intent of the committee. All those in favor say aye.

Opposed, no?

It is so ordered.

(Whereupon, the subcommittee moved to other business.)

A-64

HOUSE OF REPRESENTATIVES

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REPORT OF PROCEEDINGS

Hearing held before

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

- - - - -

H. R. 1055

Washington, D. C.

June 2, 1953

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I N D E X

Statement of — Page

Honorable Harold A. Patten, a Representative in Congress from the State of Arizona — 2

H. R. 1055

- -

TUESDAY, JUNE 2, 1953

House of Representatives,
Committee on Interior and Insular Affairs,
Washington, D. C.

The committee met, pursuant to other business, Honorable A. L. Miller (chairman) presiding.

Chairman Miller. The next bill for consideration is H. R. 1055, To terminate Federal discrimination against the Indians of Arizona. The bill is authored by Mr. Patten.

(H. R. 1055 is as follows:)

[Bill omitted in printing, see page A-3.]

Chairman Miller. I believe Mr. Harrison of Wyoming handled the legislation.

Mr. Harrison. I was not here at the final hearing, Mr. Chairman. Mr. D'Ewart or Mr. Berry handled it.

Mr. Berry. Mr. D'Ewart.

Mr. Harrison. But Mr. Patten is in the room.

It is the feeling of the committee, however, that this bill should be reported out for possible action by the House to see whether or not it could be acted on favorably. And these amendments you have before you on your desk were adopted to try to help the bill. Mr. Patten is here if you would like to ask him any questions about it.

Chairman Miller. Mr. Patten, our colleague from Arizona. Have you any

comments on the particular amendments the committee adopted?

STATEMENT OF HONORABLE HAROLD A. PATTEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. Patten. Mr. Chairman and members of the committee:

Of course, I just saw the amendments this morning.

I like the amendment particularly to change the title and eliminate Arizona and make it the Indians of the United States.

Mr. Abbott of the subcommittee staff, I believe, worked these amendments out with three thoughts in mind, which I believe are good.

One is to eliminate any elimination (sic) of the liquor being sold on or near a school ground, which I think, while that

actually does not apply because if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard--but I am afraid you would build up a barrier in that people could get the false impression.

The other is the fact, if I understand, it does not eliminate the discrimination of prohibiting Indians from operating distilleries. As you know, that is the biggest objection to the liquor prohibition against Indians. Of course, I was a little surprised to find out the law enforcement agencies the sheriff, the city police, and all adjoining towns to the Indian reservations in Arizona, supported the elimination of the liquor restriction, because they know of the great harm the Indians do to themselves and to the community, particularly, in making raisin jack. As I told you, the largest purchases of Sunmaid

Raisins in the Southwest are the Indian trading posts. And they take that and make And they take that and make raisin jack, some of it highly impure. And that causes most of our difficulties. So I think distillation, if I understand the bill, is still in there.

Mr. Dawson. Could I ask a question?

Chairman Miller. Mr. Dawson.

Mr. Dawson. Who proposed these amendments? And do we have a Department report on the bill?

Mr. Rhodes. There was a Department report on the bill, and the amendments as they are now are substantially as proposed by the Department. Counsel for the committee, Mr. Abbott, actually worked out the wording, and I assisted him on certain points of it.

The sections which are now in the amendments which were not in the original

bill are 3113, 3488 and 3618. Those are merely refinements to clean up the record.

In other words, section 3113 provided for search and seizure in the event of suspected liquor. Setion 3488 provides for confiscation of vehicles which are used to transport liquor. Section 3618 is the general enforcement provision.

If this bill passes, of course, there is no reason for those enforcement provisions as they apply to Indian country. So it was felt, rather than leave them in the law, which might act as a confusing element, that the whole thing should be cleaned up at once.

Mr. Dawson. What is the reason for limiting this bill to discrimination against the Indians in Arizona?

Mr. Patten. Of course, that was my interest in trying to get that, because it requires the permission of the United

States Government. As you know, section 3 permits the State of Arizona, by their own action and by election, to amend their constitution.

Mr. Rhodes. If the gentlemen will yield, you will note, Mr. Dawson, on the line of the amendments, this title is taken care of. Amend the title to read: "to eliminate certain discriminatory legislation against Indians in the United States."

Mr. Engle. As amended, the title applies to all Indians?

Mr. Rhodes. That is correct.

Mr. Engle. That makes it all right with me.

Mr. Patten. As I understood the thinking of the subcommittee the D'Ewart Bill, as they passed it out, removed all discriminations with the exception of those against liquor transportation, possession

and consumption. This bill would specifically point up those issues and allow the Congress or this committee, however it shall, to decide on those points.

The State of Arizona in its constitution in two regards prohibits the Indians certain activities. Of course, we have the problem that all treaties with Indians prohibit their use of firearms and purchase of ammunition, and the sale and consumption of liquor. I think it takes a specific Act of Congress in order to abrogate those provisions defined in the treaty. And then I should imagine it would take action on the part of the tribal council to accept it if we rewrite the treaty in that regard.

Mr. Engle. If the gentleman will yield, in California recently our Legislature repealed the law that prevents the

sale of liquor to Indians, and the Federal people went out and nevertheless insisted on enforcement of those provisions which existed in Federal law. A great deal of confusion has arisen from the fact that the State withdrew their prohibition and the Federal prohibition still exists.

I made a check on the situation to see whether or not Federal regulations would apply exclusively upon Indian territory, and much to my surprise I found out that Federal law is broad enough so that you could hardly sell liquor to an Indian Indian anywhere and be safe, whether it was on a reservation or not.

This provision has caused a lot of dissention and hard feeling. These Indians are drafted into the Service and go over to Korea and get shot at, and they cannot come back and walk into a bar. They consider it an abridgment of their citizenship which is

which is wholly inconsistent with the obligations of citizenship which have been imposed upon them under the draft law and which they have freely accepted as an obligation of patriotism to their country. If we are going to continue to ask these Indians to bear arms for the country, we simply have to remove these kinds of discriminatory provisions.

I am certainly in favor of it, and I will support the gentleman on the floor. I hope the bill will be amended so it is broad enough to wipe them all out everywhere, at least in my State and his, and put these Indians in the same position wiuth reference to going into a bar that they are with reference to going on to the battlefield.

Mr. Patten. It is interesting to note that New Mexico has removed their restrictions also, and the Legislature of Arizona

has memoralized Congress asking they be removed.

Chairman Miller. The bill will be considered as read, without objection, and is now open at any place for amendment.

Mr. Engle. I offer the amendments presented in en bloc, the amendments as presented by the subcommittee.

Chairman Miller. Is that satisfactory to you, Mr. Harrison?

Mr. Harrison. Yes.

Chairman Miller. Any discussion or second?

Mr. Wharton. Second.

Chairman Miller. You have heard the motion and the second. All those in favor of the motion to accept the amendments offered en bloc, including the amendment to change the title, will signify by saying aye.

Contrary, no?

It is so ordered.

Mr. Harrison. I move the bill be reported favorably, Mr. Chairman.

Mr. Engle. Second.

Chairman Miller. Those in favor of the motion signify by saying aye.

Contrary, no?

It is so ordered.

(Whereupon, the committee moved to other business.)

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No. 82-401

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE,
Individually and as Director
of the Department of Alcoholic
Beverage Control of the State
of California,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Respondent disagrees with petitioner's statement of the questions presented. Based on the facts presented and the arguments advanced by the parties in the courts below, the questions presented for resolution by this Court are:

1. Does 18 U.S.C. §1161 grant to the states the authority to license the sale of liquor by a reservation Indian doing business in Indian country?
2. If 18 U.S.C. §1161 does not so authorize the states, does the Twenty-first Amendment provide an independent source of such licensing authority?

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STATEMENT OF THE CASE

Respondent is in general agreement with petitioner's statement of the case. However, a couple of additional facts that were not included in petitioner's statement bear mentioning here.

First, at the time this suit was filed in the District Court, a California off-sale general liquor license sold on the open market for approximately $55,000. J.A. 9. Second, at certain intervals the California Department of Alcoholic Beverage Control has issued such licenses for a lesser sum, but those licenses were issued by lottery system only to those few persons fortunate to have their names drawn at random. J.A. 9. The Court of Appeal's decision allows respondent, a reservation Indian, to sell liquor from her general store on the Pala Indian Reservation free of these and other aspects of the state licensing scheme.

SUMMARY OF ARGUMENT

Contrary to petitioner's contention, 18 U.S.C. §1161 does not grant to the State of California the authority to regulate through licensing a reservation Indian (and licensed Indian trader), such as respondent, who proposes to sell liquor from her general store on the Pala Indian Reservation. Rather, that statue only requires the act of selling or distributing liquor (the "act or transaction") to be in harmony with state standards. These standards are those that reflect important state policies, such as protecting minors from the dangers associated with alcohol consumption, but do not encompass the whole range of state liquor regulatory procedures, especially those designed primarily as enforcement and revenue-raising mechanisms, such as licensing requirements.

Section 1161 must be read as respondent proposes given the lack of clear indications of congressional intent in the language and

legislative history of the statute to grant such jurisdiction to the states; the language of other, contemporaneous acts of Congress dealing with similar subject matter; traditional notions of tribal sovereignty and the federal policy of encouraging tribal self-government; the interpretations of §1161 by the agency charged with its administration; and the preemptive control that the federal government has exercised for more than a century over Indian liquor transactions in particular and Indian commerce in general.

Through many decisions dealing with Indian affairs and interests, this Court has fashioned specific canons of statutory construction to guide the federal courts in the task of interpreting federal statutes, such as §1161, which affect individual Indians and tribes. These canons are unique to Indian cases and reflect the important federal policy of protecting the right of Indian tribes and people to make their own

laws and be governed by them, free from state jurisdiction and control. As the discussion below indicates, the Court of Appeals faithfully and correctly applied these canons in reaching the interpretation now urged by respondent in this Court.

Petitioner asserts for the first time in this Court that the Twenty-first Amendment is an independent source of state jurisdiction in this case. This Court, however, has held that the Twenty-first Amendment increased the states' power to regulate liquor within their respective jurisdictions, but in no way increased their jurisdiction over federal reservations within state boundaries. These holdings apply with particular force to Indian reservations because of the preemptive federal power over Indian liquor transactions and over Indian commerce in general.

Petitioner attempts to avoid this straightforward application of Indian law principles in interpreting §1161 by raising

a host of hypothetical problems that might allegedly occur if this Court upholds the Court of Appeals' decision. There is no factual support in the record to support petitioner's parade of horribles. Moreover, these imagined fears are contradicted by the actual experience of other states in concrete factual situations involving tribal licensing of reservation liquor transactions; by the California Legislature's prompt and unreserved acquiescence in the Court of Appeals' decison; and by the presence of an adequate federal/tribal enforcement scheme.

ARGUMENT

I. IN CONCLUDING THAT CONGRESS DID NOT INTEND 18 U.S.C. §1161 TO CONFER ON THE STATES LICENSING JURISDICTION OVER RESERVATION INDIANS, THE COURT OF APPEALS PROPERLY INTERPRETED THE STATUTE.

A. Well-Established Rules Of Statutory Interpretation In Indian Cases Demonstrate That 18 U.S.C. §1161 Is Reasonably Subject To Only The Reading Given It By The Court Of Appeals.

In interpreting §1161 the Court of

Appeals started with the premise that state jurisdiction over Indian reservations is strongly disfavored and that state laws are generally inapplicable to tribal Indians except where Congress has expressly provided that they shall apply. Rehner v. Rice, 678 F. 2d 1340, 1343 (9th. Cir. 1982) ["Rehner"]. The Court of Appeals then conducted a painstaking analysis of §1161, applied the canons of construction that this Court has consistently used in interpreting federal statutes affecting Indians, and concluded that §1161 was reasonably susceptible to only the construction which precludes state licensing jurisdiction over reservation Indians such as Mrs. Rehner. 1/

1. Early in its brief on the merits, petitioner uses the term "control," instead of "regulation" or "jurisdiction," in asserting licensing authority over Indian country liquor retailers. However the petitioner may characterize its intent, there is no question that licensing is one of the means by which the State of California regulates liquor retailers and enforces it liquor laws. Later in its brief, petitioner candidly states that "[B]y removing state licensing authority, (cont'd on next page)

Petitioner's claim that §1161 is a grant of state licensing authority over Mrs. Rehner simply ignores these well-established canons of statutory construction, as well as the legal principles and policy considerations that underlie the unique relationship between Indian people and the federal government.

1. There is no clear and express congressional grant of state licensing jurisdiction in 18 U.S.C. §1161.

Before a court may conclude that Con-

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1. (cont'd). the court has removed state enforcement authority . . ." P.B. at 74. Clearly petitioner seeks regulatory authority over Mrs. Rehner.

Petitioner attempts to read into the Court of Appeals' decision a distinction between regulatory jurisdiction over the subject matter and judicial jurisdiction over the person, while asserting that the Court was concerned with the latter in rejecting state licensing jurisdiction over reservation Indians. P.B. at 56. This novel suggestion ignores repeated references by the Court of Appeals to "licensing and distribution jurisdiction," Rehner, 678 F. 2d at 1346, 1348, 1349, 1351. As a practical matter, it seems a bit ridiculous to contend, as petitioner does, that the State can claim "power over a license" without claiming similar power or authority over the licensee.

gress intended to grant to states jurisdiction over the activities of reservation Indians, the court must find a clear and unambiguous statutory authorization for such state jurisdiction:

> State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-71 (1973) ["McClanahan"]; see also Bryan v. Itasca County, 426 U.S. 373, 376-79 (1976) ["Bryan"]; Moe v. Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, 425 U.S. 463, 475-76 (1976) ["Moe"]; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 ["White Mountain Apache"]. This principle is derived from the plenary power of Congress under the Indian Commerce Clause, Art. 1, §8, cl. 3, and from traditional notions of Indian self-government. White Mountain Apache at 142-43; Ramah Navajo School Board,

Inc. v. Bureau of Revenue, ___ U.S. ___, 73 L. Ed 2d 1174, 1180 (1982) ["Ramah"]; United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . Significantly, when Congress has wished the states to exercise this power, it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.

Williams v. Lee, 358 U.S. 217, 221 (1969); see also United States v. Burns, 529 F. 2d 114, 117 (9th Cir. 1976).

Petitioner ignores this basic canon of construction since there clearly is no express grant of state jurisdiction in §1161. State jurisdiction is not even mentioned and the statute itself "is not cast in the form of a jurisdictional grant to anyone" (emphasis added). Rehner, 678 F. 2d at 1345. Petitioner also ignores that the only mention of jurisdiction contained

in §1161 is made in reference to "the tribe having jurisdiction over such area of Indian country . . ." (emphasis added). Id.

A corollary to this rule of construction which further supports the Court of Appeals reading of §1161 creates a presumption that Congress, unless it clearly indicates otherwise, intends to continue its policy of allowing reservation Indians to govern themselves free from state control. Accordingly, in construing federal legislation affecting Indians this Court has presumed, in the absence of clear indications to the contrary, that no radical departure in congressional policy toward Indian people is intended and that traditional immunities have been preserved. See Morton v. Mancari, 417 U.S. 535, 541, 549-551 (1974); Bryan, 426 U.S. at 381, 392-393; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); In re Heff, 197 U.S. 488, 499 (1905).

This presumption of congressional intent is further supported by specific

federal legislation both before and after the 1953 enactment of §1161, reflecting a policy that encourages reservation Indians to govern themselves free from state control. The 1934 Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. §476, promoted tribal self-government by providing a mechanism by which Indian tribes could adopt new constitutions and restructure their governments. Fisher v. District Court, 424 U.S. 382, 387 (1976). More recent federal laws have furthered tribal self-government and promoted tribal economic development. See, e.g., the Indian Finance Act, 88 Stat. 77, 25 U.S.C. 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. 450 et seq.. Federal enactments affecting Indians must be read in light of these policies. See Bryan, 426 U.S. at 387-388 and n. 14; Ramah, 73 L. Ed 2d at 1185.

State licensing and taxation of reservation Indians are among the clearest exam-

ples of state actions that interfere with these federal policies and inherent tribal powers. See McClanahan, 411 U.S. 164; Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 690-91 (1965) ["Warren Trading Post"]; Bryan, 426 U.S. at 377; "Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. 39, 41-42 (February 3, 1971).

Moreover, Congress has consistently given any proposed extensions of state jurisdiction over reservation Indians "comprehensive and detailed scrutiny." Kennerly v. District Court, 400 U.S. 423, 426-27; Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 661 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). In Santa Rosa the Court of Appeals noted the disastrous impact which a state veto over tribal economic development would have. Id. at 664 and n. 14. An analogous situation would exist in this case, if the intrusive and economically burdensome aspects of California's liquor

licensing scheme were imposed on Mrs. Rehner or other reservation Indians. See discussion, infra, at Section V(B).

Petitioner's reading of §1161 not only departs from the general rules of construction and federal policies described above, but is inconsistent with this Court's interpretation of §1161 in United States v. Mazurie, 419 U.S. 544 (1975) ["Mazurie"]. Mazurie held that Congress through §1161 delegated to tribal governments a share of its broad authority over liquor in Indian country. Rather than suggesting an abandonment of the federal policy promoting tribal self-government, the Court specifically relied on recognition of tribal sovereignty to justify the Congressional decision to delegate federal legislative authority to Indian tribes. Id. at 556-557.

Rather than granting the state jurisdiction, §1161 merely provided a procedure for a tribe "having jurisdiction over such area of Indian country" to lift the absolute

bar of the federal Indian liquor laws and accept the delegation of regulatory power over liquor transactions that the Court upheld in Mazurie. Once that procedure is completed and the tribe's liquor ordinance is properly certified by the Secretary of the Interior and published in the Federal Register, the ordinance governs liquor transactions in that area of Indian country.

In the face of the applicable rules of construction and federal policies, and Mazurie, petitioner relies upon the decision in Maine v. Thiboutot, 448 U.S. 1 (1980) ["Thiboutot"], to negate the Court of Appeals' holding that the phrase "laws of the State," as used in §1161, does not include the State's licensing and regulatory laws. P.B. at 9, 20-21. Such reliance is misplaced. The statutory language reviewed in Thiboutot concerned the scope of individual rights under a federal statute (42 U.S.C. §1983) which this Court construed in light of its historic function to protect

such rights, and is simply not comparable to §1161 which applies to persons and areas that have historically and constitutionally been subject to the plenary power of Congress, and beyond the jurisdiction of the states.

Finally, just as this Court in Thiboutot found that the "consistent treatment" of the "and laws" provision in earlier cases encompassed violations of federal statutory provisions other than civil rights or equal protection laws, Thiboutot, 448 U.S. at 447-48, so also this Court has consistently held that grants of jurisdiction to states over tribal members and reservations cannot arise by vague reference or implication, but must be express. McClanahan, 411 U.S. at 170-71; Bryan, 426 U.S. at 376-79; Moe, 425 U.S. at 475-76; Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655-56 (1978); White Mountain Apache, 448 U.S. at 143-44.

2. Reading 18 U.S.C. §1161 in para materia with P.L. 280 and the Termination Acts precludes reading into 18 U.S.C. §1161 a grant of jurisdiction to the states.

To determine congressional intent in enacting §1161, the Court of Appeals properly examined the language of both Public Law 280, 67 Stat. 589, 18 U.S. 1162, 28 U.S.C. 1360, and the Termination Acts in construing the language of §1161. This analysis placed the language of §1161 in its proper legislative context.

Pub. L. 280 and 18 U.S.C. 1161 were passed by the same Congress in 1953, within a few days of each other. The difference in the language of the two statutes, however, is striking. Pub. L. 280 contains an express grant of jurisdiction to the states, giving them authority to enforce certain state laws in Indian country. 2/ Section

2. Notwithstanding this express grant to the states of civil jurisdiction in Indian country this Court refused to read that jurisdictional grant as encompassing the kind of full civil regulatory jurisdiction over Indians in Indian country sought by the state herein. (cont'd on next page)

1161 contains only an "oblique reference" to state law. Rehner, 678 F. 2d at 1346.

Reading §1161 in para materia with Pub. L. 280, the Court of Appeals observed that

> In contrast to section 1161, Pub. L. 280 expressly grants civil and criminal jurisdiction to the states. In so doing, Congress expressed its intent with words similar to those employed in its reference to jurisdiction of the tribes in section 1161. * * * There is no language in section 1161 indicating that the states were granted jurisdiction

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2. (cont'd.) Bryan, 426 U.S. at 384. This narrow construction of the express grant in Pub. L. 280 was based in part on the absence in its legislative history of any discussion of general civil regulatory jurisdiction. A fortiori, a similar absence in the legislative history of §1161 (see discussion, infra, at Section III) compels the conclusion that the statute does not grant licensing authority over reservation Indians to the states, because that statute, unlike Pub. L. 280, does not contain any express grant of jurisdiction whatsoever. Even as a matter of policy petitioner has failed to provide any reason for this Court to depart from the approach it took in Bryan. Petitioner has failed to meaningfully distinguish its interest in licensing Indian liquor sellers from its interest in regulating other subject matter affecting the public health and safety.

> over Indian country liquor transactions.

Id. at 1346. By reading §1161 in para materia with P.L. 280, any potential ambiguity that otherwise might arise if it were read outside of its legislative context is eliminated. Thus, P.L. 280 provided an essential interpretive device for construing §1161:

> A close examination of Pub. L. 280 reveals, then, that when Congress has extended state jurisdiction over Indian country it has done so affirmatively by using precise language, not by oblique reference to state law.

Rehner, 678 F. 2d at 1346.

The Court of Appeals similarly construed §1161 in para materia with the Termination Acts and pointed out that "[t]he Termination Acts are replete with language expressly conferring jurisdiction upon the states" (emphasis in original text) and that a "[v]ague reference to the laws of the State, as found in section 1161, was never

assumed to suffice as a grant of jurisdiction" (emphasis added). Rehner, 678 F. 2d at 1345.

In marked contrast to the language of both Pub. L. 280 and the Termination Acts is the total absence of any mention of state "jurisdiction" in 18 U.S.C. §1161. There is no mention that state liquor laws shall have the "same force and effect" (see 18 U.S.C. §1162 and 28 U.S.C. §1360(a)) in Indian country as elsewhere, or that the "laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens . . ." (see 25 U.S.C. §726). The same Congress that enacted §1161 obviously knew how to make clear an intent to confer state jurisdiction over reservation Indians and knew how to express a congressional intent to extend state laws to Indian country.

Contemporaneous acts of Congress regarding the applicability of state laws in Indian country must be considered in pari

materia and construed together. Comparing the several Termination Acts mentioned above to Pub. L. 280 led this Court to conclude that Pub. L. 280 did not authorize state civil regulatory authority on Indian reservations. Bryan, 426 U.S. at 389-390; see also, Menominee Tribe v. United States, 391 U.S. 404, 411 (1968); Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 662 n. 9. Similarly, a comparison of §1161 with Pub. L. 280 and the termination acts discussed in Bryan compel a conclusion that state licensing of Indians in Indian country was not intended.

B. Prior Decisions By This Court Rebut The So-Called "Plain Meaning" That Petitioner Attributes To The "In Conformity With" Language Of 18 U.S.C. §1161.

Applying the canons of construction discussed above, this Court need go no further. There is no clear, express grant of licensing jurisdiction to the states in §1161. The decisions in Moe, McClanahan, and Bryan are dispositive.

Nevertheless, petitioner argues that the "in conformity with" language of §1161 "plainly means" [3] that Mrs. Rehner must submit to the State's liquor licensing scheme. P.B. at 21-23. Prior decisions by this Court, however, have construed similar language contrary to the meaning urged by petitioner in a way that precludes any requirement that federal installations submit to state licensing authority. Hancock v. Train, 426 U.S. 167 (1976); Environmental Protection Agency ["EPA"] v. State Water Resources Control Board, 426 U.S. 200 (1976).

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3. Petitioner's suggestion that the clarity of the statute's words precludes recourse to other interpretive aids attempts to resurrect the largely discredited "plain meaning rule." See Merz, The Meaninglessness of the Plain Meaning Rule, 4 U. Dayton L. Rev. 31 (1979); Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). Since even the simplest words can be understood differently in different contexts, this argument has been rejected by modern courts. Cass v. United States, 417 U.S. 72, 78-79 (1974).

In Hancock this Court held that the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (recodified at §7401), did not authorize States to require that federal installations obtain state operating permits. Id. at 198-99. The requirement that federal installations "shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements" (42 U.S.C. §1857f; recodified at §7418) did not require the federal installations to comply with all State requirements, including State permit requirements, especially where the statute "does not identify the applicable requirements." Id. at 182. The Court distinguished between State substantive and procedural requirements and rejected Kentucky's argument "that Congress necessarily implied the power to enforce from the conceded authority to develop and set emission standards." Id. at 183.

Kentucky's argument that a duty to comply with state standards would be "utterly meaningless" absent state enforcement power was based on the same faulty assumptions -- a lack of other enforcement authority and an implied congressional intent to grant the states such authority -- on which the petitioner here bases its similar argument. The Court in Hancock rejected both assumptions, id. at 183-84, in holding that the compliance mentioned in the statute did not include submission of federal installations to state permit requirements and attendant state enforcement power.

Similarly, in the companion case of EPA V. State Water Resources Control Board, supra, 426 U.S. 200, this Court held that the compliance language of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1323, did not authorize States to require federal installations to obtain state operating permits.

Thus, in both Hancock and EPA, this

Court construed language similar to the "in conformity with" language of §1161 and concluded, as the Court of Appeals did in the context of Indian country liquor transactions, that Congress intended state substantive standards to apply to the particular activities involved, but did not intend, nor clearly express, any grant of licensing jurisdiction or enforcement power to the States. 4/

Petitioner's reliance on California v. United States, 438 U.S. 645 (1978), in arguing to the contrary is entirely misplaced.

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4. The mere incorporation of state standards does not connote either the inapplicability of federal law or a transfer of enforcement jurisdiction to the states. See, e.g., the Assimilative Crimes Act, 18 U.S.C. §13, and the Major Crimes Act, 18 U.S.C. §1153. More recently, in revising the regulations governing federal Indian traders, the Bureau of Indian affairs has proposed to modernize them by adopting as its regulations the consumer protection laws of the state where the business is located. 47 Fed. Reg. 48,492 (1982). This is another example of utilizing state substantive standards without a transfer of federal jurisdiction.

P.B. at 21-23. A fair reading of that lengthy opinion reveals that the Court's decision acknowledging that state permit requirements govern the appropriation of water for federal water projects was reached against the unique backdrop of a limited federal deference to state water law in the reclamation of arid lands of the Western States. Id. at 653 and 663. Petitioner, however, argues (without a single citation of authority in support) that "the deference accorded by Congress to state water laws is identical to the deference Congress has given to state liquor laws." P.B. at 22-23. [5/] This bald assertion ignores over a century of preemptive federal control of

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5. The argument that the "conformity" language of §8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §372, mandates the application of state water law and permit procedures to non-reclamation federal lands was explicitly rejected in Cappaert v. U.S., 426 U.S. 128, 143 n. 9 (1976), illustrating how narrowly such "conformity" language is construed. Where federal lands are concerned, there simply is no general "deference" to state water law.

liquor transactions involving Indians, as well as numerous federal court decisions which not only demonstrate no historical deference to state liquor laws where Indians and Indian country are concerned, but also serve to illustrate the federal government's active and successful opposition to state attempts to assert such control. See discussion, infra, at Section IV(A). Congress has repeatedly signalled its deference to State water law in the reclamation context, but has just as forcefully guarded its preemptive authority over Indian liquor transactions. While the "conformity" language of §8 of the Reclamation Act of 1902 may be superficially similar to the "in conformity with" language of §1161, the holding in California v. United States, supra, is simply not applicable in this context.

C. Any Ambiguity That Exists In 18 U.S.C. §1161 Must Be Resolved In A Way That Protects Mrs. Rehner's Right To Engage In The Sale Of Liquor Without First Obtaining A State Liquor License.

If this Court should determine that

§1161 is ambiguous regarding the extent of state licensing authority over Mrs. Rehner, a reservation Indian, under applicable precedent it must resolve the ambiguity in her favor. Bryan, 426 U.S. at 392; see, also, Northern Cheyenne Tribe v. Hollow-breast, supra, 425 U.S. at 655 n. 7; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1919); Choate v. Trapp, 224 U.S. 665, 675 (1912); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832); Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 660. This "eminently sound and vital canon of construction," Northern Cheyenne Tribe v. Hollowbreast, supra, reflects the protected status of reservation Indians and Indian tribes under federal law, as well as the judicial admonition that courts should not presume, in the absence of express language to the contrary, that Congress has acted in a manner that would subject them to state jurisdiction and control. By interpreting ambiguous statutes

in favor of the Indians, the courts attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations. Squire v. Capoeman, 351 U.S. 1, 7-8 (1956).

The only construction of §1161 that is favorable to Mrs. Rehner and the Pala Band is one which upholds "traditional notions of Indian self-government," White Mountain Apache, 448 U.S. at 143, and recognizes the preemptive role that Congress and tribal governments play in regulating liquor in Indian country. See Mazurie, 419 U.S. 544.

In White Mountain Apache, Justice Marshall emphasized that these traditional notions of Indian self-government provide an important backdrop "against which vague or ambiguous federal enactments must always be measured." Id., at 143. See, also, Ramah, 73 L. Ed 2d at 1185. Moreover, as we point out elsewhere in this brief (see discussion, infra, at Section V(B)), interpreting the statute so as to impose state licensing and

regulatory authority on reservation Indians engaging liquor sales could totally thwart the tribal exercise of powers specifically delegated under §1161. Such an implicit divestiture of tribal authority in favor of state jurisdiction cannot be squared with the Court's own admonition that

> "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L. Ed 2d 21, 37 (1982) ["Merrion"]; citing Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 60.

II. THE DEPARTMENT OF INTERIOR'S READING OF 18 U.S.C. §1161 IS CONSISTENT WITH THAT OF THE COURT OF APPEALS AND IS ENTITLED TO GREAT WEIGHT AND DEFERENCE.

As respondent argued in the Court of Appeals, courts accord great weight and deference to "the interpretation given [a] statute by the officers or agency charged

with its administration." Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556 (1980).

The Department of the Interior ("Department"), and the Bureau of Indian Affairs ("Bureau"), have broad experience in the complex tripartite jurisdictional relationship between the federal government, Indian tribes, and states, and in the management of Indian liquor trade. The Bureau has traditionally served a major role with regard to Indian liquor regulation:

> From an early day . . . it has been one of the important duties of the Indian Office to aid in the enforcement of [Indian liquor] legislation . . .. Further, there can be no question that the authority of the Department in its undertaking to suppress the forbidden traffic extended to every matter in which its aid was appropriate. That was the clear import of the legislation broadly defining its powers.

[Emphasis added.]

United States v. Birdsall, 233 U.S. 223, 232-35 (1914).

Thus, administrative interpretations of §1161 by the Bureau and the Department are entitled to great weight since they emanate from the agency charged with the administration of the Indian liquor laws. Cf. Howe v. Smith, 452 U.S. 473, 485 (1981) [deference to Bureau of Prisons in penal matters]; Blum v. Bacon, ___ U.S. ___, 72 L. Ed. 2d 728, 736 (1982) [expertise of Secretary of Health, Education & Welfare on AFDC issues]; Northern Cheyenne Tribe v. Hollowbreast, supra, 425 U.S. at 660 [deference to Department regarding Indian allotments].

The United States Department of Justice, as amicus curiae in the proceedings below, has articulated the Department's (and the Bureau's) official position that neither §1161 nor Pub. L. 280 authorize the states to license reservation Indians engaging in the sale of liquor on Indian reservations:

> . . . nothing in 18 U.S.C. §1161 or in the Pala tribal ordinance requires Rehner to obtain a state off-sale general license to sell liquor at her store on the Pala Reservation. 18 U.S.C. §1161 leaves the regulatory power over Rehner's activities to the tribe and the federal government . . .. Liquor licenses, and the taxes imposed as fees for such licenses, clearly fall outside the area of jurisdiction granted in P.L. 280.

Brief of the United States, 16-17.

That has been the Department's position for many years. As early as 1971, the same issue arose in Montana. In a formal published opinion, the Department ultimately resolved the question in a manner similar to the Court of Appeals' decision:

> In summary, we believe the Chippewa Cree Tribe may license a liquor establishment owned or controlled by the Tribe or tribal members on the Rocky Boy's Reservation without obtaining a license from the State of Montana or abiding by the prescribed quota system. If a tribal member commits an act or engages in a

> transaction not in conformance with Montana law he may be subject to prosecution for violating the Federal Indian liquor laws.

"Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. 39, 43 (Feb. 3, 1971).

Subsequent to that decision, the United States, on behalf of the Mescalero Apache Indian Tribe, sued to enjoin the State of New Mexico from imposing its liquor licensing laws on the Tribe's resort operation. The same result was reached in that action by both the district court and the Court of Appeals as was reached by the Ninth Circuit Court of Appeals herein: the Department's position was upheld. United States v. New Mexico, 590 F. 2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979).

In determining the weight to be given to an administrative agency's position, several factors have been identified, including the thoroughness of the agency's con-

sideration, the validity of its reasoning, the consistency of the agency position, and the position's conformity to the underlying purposes of the statute. Federal Election Commission v. Democratic Senatorial Compaign Committee, 454 U.S. 27 (1981); Udall v. Tallman, supra, 380 U.S. 1. The Department's position satisfies all of these concerns. It has been thoroughly considered in several formal settings, including litigation and formal published opinions, rather than mere informal remarks. Cf. Goolsby v. Blumenthal, 581 F. 2d 455, 458 n. 5 (5th Cir. 1978), reversed en banc on other grounds, 590 F. 2d 1369 (5th Cir. 1979) [speech by head of agency at public meeting afforded little deference]; 2A Sutherland Statutory Construction, §49.06 at 249 (4th ed. Sands 1973). The validity of the Department's reasoning is buttressed by its acceptance by all independent tribunals that have considered the question, with the sole exception of the district court herein.

United States v. New Mexico, supra, 590 F. 2d 323; Zaste v. North Dakota, Civ. N. A1-75-29 (D.N.D.1/31/77); Rehner, 678 F. 2d 1340. Similarly, the Department has been consistent in its views on §1161. Finally, the Department's view is in harmony with the avowed intent of §1161, which was originally intended to remove liquor law discrimination against Indians. H.R. 1055, 83rd Cong., 1st Sess. (1953); P.B., Vol. II at A-4.

This Court has observed that "administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." Miller v. Youakim, 440 U.S. 125, 144 (1979). Since the Department actively participated in drafting §1161 its position is entitled to even greater deference.

III. THE LEGISLATIVE HISTORY OF 18 U.S.C. §1161 REFLECTS NO INTENT BY CONGRESS TO GRANT STATES LIQUOR LICENSING JURISDICTION IN INDIAN COUNTRY.

A. Petitioner's Legislative History Arguments Are Unpersuasive.

Petitioner argues that §1161's legislative history "conclusively establishes" Congressional intent to impose state liquor licensing laws on reservations. P.B. at 31-38. This, according to petitioner, is shown by negative implication: that since the legislative history fails to discuss Indian retailers or jurisdiction, and addresses only the removal of discrimination, resulting state jurisdiction was assumed by Congress. P.B. at 31, 37-43. Leaving aside, momentarily, the violence such an assumption does to established principles of Indian law, petitioner's argument is flawed because such a negative inference cannot furnish the requisite congressional intent. See discussion, supra, at I(A) & (C).

Also, petitioner mistakenly asserts that the removal of discrimination against

Indians necessarily implies an intent to place them on a legal par with other state citizens, without regard to their Indian status. P.B. at 31-33, 35, 37. Petitioner seems to argue that the price for removing that discrimination was intended to be a sort of de facto "termination," at least with regard to alcohol, since otherwise the Indians' status would place them "in a position superior to non-Indians." P.B. at 35. Such an argument ignores the precedents of this Court upholding differential treatment of Indians because of their unique legal status and the existence of the federal/Indian relationship. See, e.g., Morton v. Mancari, supra, 417 U.S. 535. It also ignores the obvious fact that differential treatment is not necessarily preferential treatment, and that despite the states' traditional reluctance to recognize it, their Indian citizens are in fact treated differently in some

respects. [6] To deny them that "different-ness" would have the effect of erasing an entire Title of the United States Code (25 U.S.C.) and two hundred years of legal precedent. Morton v.Mancari, supra, 417 U.S. at 552. While petitioner might welcome such a change, it simply cannot be inferred from Congressional silence.

The courts that have examined the legislative history of §1161 have found little evidence of the clear Congressional intent that petitioner professes to find. The Court of Appeals noted "the complete absence of any discussion concerning state

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6. A similar unwillingness to recognize the unique status of Indians and Indian reservations is illustrated later in petitioner's brief, where it argues that "[t]here is absolutely no reason why state licensing laws should be applied on the one side of the street . . . and not be allowed to apply on the other side simply because the latter is Indian country." P.B. at 81. Clearly, the same could be said of military reservations, national parks, and other areas beyond the reach of state jurisdiction, and in fact of any border separating different spheres of jurisdiction.

licensing and jurisdiction over liquor." Rehner, 678 F. 2d at 1346. The Tenth Circuit concluded that the materials "fail to evidence the kind of intent and purpose which New Mexico seeks to establish." United States v. New Mexico, supra, 590 F. 2d at 329. Even petitioner admits that the history is "rather sparse," and that jurisdictional questions were generally not discussed. P.B. at 31, 37. Far from clearly expressing legislative intent, the materials are instead vague, ambiguous and somewhat contradictory on these questions, and therefore are of limited value in construing the statute.

This Court in Gemsco v. Walling, 324 U.S. 244, 260 (1944), observed that such a legislative history "through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." This sort of construction through ambiguity is particularly dangerous in Indian cases.

See Merrion v. Jicarilla Apache Tribe, supra, 71 L. Ed 2d at 37, citing Santa Clara Pueblo v. Martinez, supra, at 60.

In the absence of clear legislative history, resort to additional means of interpretation is required. United States v. Dickerson, 310 U.S. 554, 562 (1940). Nevertheless some persuasive (if not dispositive) evidence in favor of respondent does appear in the legislative history.

B. The Legislative History That Does Exist Indicates That Congress Intended No Major Changes In The Jurisdictional Scheme.

The underlying purpose of Congress in passing 18 U.S.C. §1161 was to end the absolute federal prohibition on the sale of intoxicants to Indian people and on possession and introduction of liquor in Indian country. These prohibitions were considered exceptionally and unjustifiably discriminatory. See, "Eliminating Certain Discriminatory Legislation Against Indians In The United States," H. R. Rep. No. 775, 83rd

Cong., 1st Sess. (1953).

During consideration in the preceding year (1952) of draft legislation that eventually was enacted as Pub. L. 280, a provision on liquor control was inserted to accomplish this anti-discriminatory purpose. The draft provision would have ended discrimination against Indians in the liquor laws by replacing federal jurisdiction over liquor with state jurisdiction granted under Pub. L. 280. See Hearings on H.R. 459, H.R. 3235, and H.R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 2d Sess. (February 28, and 29, 1952) pp. 30, 33-34; 99 Cong. Rec. 9963 (July 27, 1953). The proposed provision simply declared the discriminatory liquor laws inapplicable to those areas of Indian country subject to state jurisdiction under Pub. L. 280:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, and the provisions of section 2141 of the

> Revised Statutes (25 U.S.C. sec. 251) shall not apply within those areas of Indian country that are subject to the provisions of section 1161 [later 1162] of this title, nor within those areas of the states named in said section 1161 that are not Indian country.

Id.

The idea of vesting states with the power to enforce liquor laws against reservation Indians received at least one letter of support. See letter dated May 1, 1951, from Minnesota Governor Youngdahl, 99 Cong. Rec. 10783 (Aug. 1, 1953). But there was strong opposition from tribes to this method of ending the absolute liquor prohibition. Hearings, supra, pp. 45, 83. They argued that the change in federal liquor laws should not be conditioned upon the assumption of state jurisdiction in Indian country. Felix Cohen, a former Associate Solicitor of the Interior Department and Chairman of Interior's Board of Appeals, as well as author of the oft-cited Indian law

treatise, Handbook on Federal Indian Law, voiced the Indian objection:

> The second thing the Indian Bureau's approach does which I think is wholly wrong is to tie together state jurisdiction and liquor, two things that never should be tied together. All of the tribes of Montana, meeting at Helena, November 27, 1951, protested against this Indian Bureau tie up to state jurisdiction and liquor, and insisted that repeal of the discriminatory law on liquor [reading]: 'Should not be made conditional upon the elimination of tribal law or codes or any other surrender of individual rights'.
>
> Now, I had thought that our standards of fair and honorable dealings had improved somewhat in the last 148 years, and I hope I am right, but I am shocked at the tie up that the Indian Bureau now proposes between the drinking of liquor and the extension of state jurisdiction, and I hope that the committee will adhere to the alternative urged by Congressman D'Ewart which is that Indians vote yes or no upon application of state law without having a

> bottle dangling in front of their noses at the time that they vote.
>
> I yield to none in my urging that the Indian liquor laws should be abolished. I don't mean the law relating to the sale of liquors on school sites. I mean the general Indian liquor laws. And that should be done independently of any extension of State jurisdiction. That should be carried through in separate legislation. Otherwise, I feel sure one will hold back the other and that the tie up itself will make both impractical of realization at this session of Congress.

Hearings, supra, at 45-46, 48.

The liquor provision was deleted from Pub. L. 280, [7] (see 99 Cong. Rec. 10783-84, Aug. 1, 1953), and P.L. 280 itself was

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7. The petitioner totally ignores this fact in arguing that the intent of §1161 was the same as P.L. 280. P.B. at 59. Moreover, the Congressional decision to delete from Pub. L. 280 the proposed liquor provision and to deal with liquor control in separate legislation leaves no doubt that Pub. L. 280 was not intended to affect liquor transactions.

subsequently construed by this Court to exclude state civil regulatory authority. See Bryan, 426 U.S. at 384, 387. States were not granted any general taxing or licensing jurisdiction over reservation Indians, nor were they granted any jurisdiction over tribal governments. Id. at 389.

H.R. 1055, the separate liquor legislation which had been introduced and which eventually became 18 U.S.C. §1161, provoked no discussion of the merits of state jurisdiction over liquor in Indian country. Such a debate would certainly be expected if Congress had intended states to have jurisdiction over Indian country liquor transactions, see Bryan, 426 U.S. at 381, especially in light of the "comprehensive and detailed . . . scrutiny" that Congress has consistently given such proposed extensions of state jurisdiction over reservation Indians. Kennerly v. District Court, supra, 400 U.S. at 426-427.

The petitioner's own arguments on this

point are unpersuasive and lack consistency. On one hand, petitioner expressly concedes that "[t]he most striking feature of the legislative history is that the legislation had nothing to do with Indian retailers or jurisdiction," P.B. at 31; [8] and, on the other, contends that §1161 is a clear and unambiguous grant of regulatory jurisdiction to the state. P.B. at 18-19, 29-30, 80.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT 18 U.S.C.§1161 CONTINUES FEDERAL PREEMPTION OF STATE LICENSING AND DISTRIBUTION OF LIQUOR IN INDIAN COUNTRY.

A. Federal Regulation Of Indian Liquor Trade Prior To §1161 Was Exclusive Both Within And Without Indian Country.

Contrary to petitioner's contentions, the federal government's role in regulating liquor transactions involving Indian people is one of the most firmly established and consistently recognized examples of federal

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8. Petitioner also concedes that "[a]t no time during the discussion in any of these [legislative] hearings was a motive other than removal of federal discrimination discussed." P.B. at 37.

preemption that can be found in case law and federal enactments. Not only has this subject area long been acknowledged as within the exclusive province of the federal government, but the federal power over liquor has been exercised far more comprehensively than other federal power over Indians.

In a number of early cases, this Court upheld Congressional regulation of liquor transactions affecting Indian people as a proper exercise of its power under the Commerce Clause. United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866). The nature of the commerce power and the authority under it to regulate liquor transactions with Indian people was held to be "exclusive and absolute". United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876); see also United States v. Sandoval, 231 U.S. 28, 46 (1913). The comprehensive nature of the powers and functions vested in the Secretary of the Interior, acting through the Commissioner of Indian Affairs,

to enforce the Indian liquor law received further elaboration in United States v. Birdsall, supra, 233 U.S. at 231-33.

Even in instances where Congress, through a state enabling act, specifically authorized a state to regulate intrastate liquor transactions involving Indians, the Court refused to construe the enabling act in a manner restrictive of Congress' power in this area. United States v. Wright, 229 U.S. 226 (1912). The Court considered these liquor transactions to be subject matter over which Congress had assumed special responsibilities. Id. at 238.

The federal power over liquor transactions involving Indian people is so broad that it extends beyond the territorial boundaries of Indian Reservations:

> The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and

> whether within the limits of a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes," and in part from the recognized relation of tribal Indians to the Federal Goverment. [Emphasis added.]

Perrin v. United States, 232 U.S. 478, 482 (1914); see also United States v. Forty-Three Gallons of Whiskey, supra, 93 U.S. 194; Dick v. United States, 208 U.S. 340 (1908).

This Court continues to recognize this sweeping power:

> Article I, §8, of the Constitution gives Congress power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic

> beverages into Indian country. [Citations omitted; emphasis added.]

Mazurie, 419 U.S. at 554. The congressional power encompasses the authority to regulate non-Indian as well as Indian liquor activities on Indian reservations and to delegate that authority to tribal governments. Id. at 554.

In Mazurie, this Court also indicated that §1161 continued federal pre-emption of state jurisdiction. The court noted that Congressional regulation in an area designated as Indian country has been presumed to supersede state jurisdiction. 419 U.S. at 555. In Antoine v. Washington, 420 U.S. 194, 203-204 (1974), current federal liquor legislation for Indian country was cited as an example of federal preemption.

Congress has confirmed its preemption of state control through a long history of federal statutes regulating liquor transactions that could affect Indian people. In 1802, the President of the United States was

given specific authority to prevent or restrain the vending or distribution of liquor among Indian tribes. Act of March 30, 1802, ch. 13, §21, 2 Stat. 139, 146. In 1832, the introduction and sale of liquor in Indian country became a federal crime. Act of July 9, 1832, ch. 174, §4, 4 Stat. 564. In 1918, to aid in the enforcement of the Indian liquor laws, Congress made possession of liquor in Indian country an independent offense. Act of May 25, 1918, ch. 86, §1, 40 Stat. 561, 563. Through various provisions, Congress has limited access to liquor in areas adjacent to Indian reservations and within territory ordinarily considered outside Indian country. See, e.g., Act of June 20, 1910, ch. 310, §2, 36 Stat. 557; COHEN, HANDBOOK Of FEDERAL INDIAN LAW 353 (1942). Since 1834, Congress has prohibited distilleries in Indian country. 25 U.S.C. §251. And, until 1953, Congress continued to prohibit absolutely the introduction, possession, or sale of liquor in Indian coun-

try. [9] See 18 U.S.C. 1154, 1156. These federal prohibitions remain in effect today; except as authorized under 18 U.S.C. §1161. See discussion, supra, at Section I.

These statutes and cases leave no doubt that the federal government has traditionally exercised exclusive authority to regulate liquor transactions on Indian reservations, and that in this area it has exercised its plenary power in a comprehensive and preemptive manner. It is also firmly established in recent decisions of this Court that where Congress regulates a subject matter comprehensively, that fact alone precludes state jurisdiction. Warren Trading Post, 380 U.S. at 689; Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160, 165 (1980) ["Central Machinery"]; White Mountain Apache Tribe, 448 U.S. at

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9. The term "Indian country" as used in 18 U.S.C. 1161 is defined in 18 U.S.C. 1151 and 1154. That term includes the Pala Indian Reservation.

143; Ramah, 73 L. Ed 2d at 1179-80. Moreover, "federal preemption is not limited to those situations where Congress has explicitly announced an intention to preempt state activity." Ramah, 73 L.Ed 2d at 1180.

> We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.

White Mountain Apache at 144, citing Warren Trading Post, supra. This Court recently applied this principle with similar force in a non-Indian law context. Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, ___ U.S. ___, 73 L. Ed 2d 664, 675 (1982).

The Court of Appeals correctly recognized that, unless 18 U.S.C. §1161 contains authorization for the state to enforce its liquor laws against Indian persons and tribes in Indian country, there is no basis for concluding that Congress has abandoned its long-standing preemption of state juris-

diction over liquor matters in Indian country. That authorization, as explained in Section I(A), supra, must be express and cannot be implied.

B. The Comprehensive Licensing And Enforcement Provisions Of The Federal Indian Traders Act, Which Apply To Mrs. Rehner's Activities, Were In Place Long Before 18 U.S.C. §1161 Was Enacted And There Is No Evidence That Congress Intended To Modify This Preemptive Federal Scheme To Include A State Licensing Requirement.

The federal government's control of Indian trade to the exclusion of state control is not limited to the regulation of liquor, but has historically extended to all areas of commerce with Indians and Indian tribes on their reservations.

At the time that §1161 was enacted there was, and remains today, a comprehensive federal statutory scheme for licensing and regulating persons who engage in trade with Indians and Indian tribes. See 25 U.S.C. §261 et seq.; 25 C.F.R. Part 140 (1982). These federal statutes and regulations determine who may engage in such

trade, 25 U.S.C. §261 et seq., 25 C.F.R. 140.1; what types of tribal contracts may be enforced, 25 U.S.C. §81; what types of credit and payment terms are authorized, 25 C.F.R. §140.23-.24; and even what prices may be charged and what types of merchandise may be sold. 25 C.F.R. §140.16-.22. One regulation specifically authorizes criminal prosecution and license revocation for traders' violations of applicable liquor laws. 25 C.F.R. §140.18. Such federal regulations "have no less preemptive effect than federal statutes." Fidelity Federal S. & L. Ass'n. v. de la Cuesta, supra, 73 L. Ed 2d at 675.

This comprehensive scheme is administered by the Department through the licensing and regulation of "Indian Traders." It was enacted to protect Indians from exploitation by unethical traders, see Ashcroft v. United States Dept. of Interior, 679 F. 2d 196, 198 (9th Cir. 1982), in response to a Congressional determination that the federal

government needed to strengthen its control of the trade. See 4 Cong. Rec. 3639, 3906-3926 (44th Cong., June 30, 1876). In passing §1161, Congress made no mention of any intent to alter this scheme by allowing states to impose additional licensing or other regulatory burdens where Indian country liquor trade was involved. In essence, petitioner urges this Court to hold that Congress impliedly qualified the Federal Indian Traders Act to allow states to impose these additional burdens on Indian traders who engage in the sale of liquor. 10/ Such a result cannot be squared with recent decisions of this Court which have expressly rejected state attempts to impose similar burdens on licensed Indian traders.

In Warren Trading Post, 380 U.S. 685, this Court discussed the federal government's general regulatory authority over

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10. Mrs. Rehner is a licensed Indian trader. J.A. 7, 21-22.

Indian traders and its preemptive effect on state jurisdiction:

> Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Art. I, §8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject. [Emphasis added.]

Id., 380 U.S. at 691 n. 18.

Petitioner argues against the applicability of Warren Trading Post by implying that the State's right to regulate liquor is more sacrosanct than even its power to tax. P.B. at 27, 90-91. But the power to tax is at least as basic as the power to regulate trade, and the federal policy of non-interference with state taxing matters is extremely strong. See, e.g., 28 U.S.C. §1341. Yet even in the face of such

strongly mandated federal deference to state taxing powers, this Court has never upheld a state tax on reservation Indians. See, e.g., McClanahan, 411 U.S. at 181; Moe, 425 U.S. at 480-81; Bryan, 426 U.S. at 390; Washington v. Confederated Tribes Of The Colville Indian Reservation, 447 U.S. 134, 163 (1980) ["Colville"]. Nor has it hesitated to strike down state attempts to tax reservations activities (even where the incidence of the tax was admittedly on non-Indian persons or entities) where such activities were subject to a preemptive federal regulatory scheme. See, e.g. White Mountain Apache Tribe, 448 U.S. at 151; Central Machinery, 448 U.S. at 165-66; Ramah, 73 L. Ed 2d at 1186.

The petitioner nevertheless argues that because there is a lack of detailed federal regulations governing Indian country liquor transactions, less preemptive force should be given to federal regulation of liquor than was afforded in cases such as Warren

Trading Post. P.B. at 91-92. However, the lack of detailed federal regulations, rather than representing a Secretarial belief that "the states are the ones to regulate liquor traffic" (P.B. at 92), instead represents a congressional decision to share regulatory jurisdiction with tribes through the enactment and enforcement of Department-approved tribal liquor ordinances. 18 U.S.C. §1161; Mazurie, 419 U.S. 544. Because these ordinances vary greatly, depending on the needs and desires of the individual tribes, general federal regulation would be either duplicative or contradictory, and hence inappropriate. Moreover, Central Machinery, 448 U.S. 160, held that it is the existence of the federal statutory scheme, not its administration or operation, that ousts state authority. Id. at 165. Any lack of specific federal regulation is therefore a natural incident of this decentralization and partial delegation to tribes of preemptive federal control.

C. Congress' Express Provision In 18 U.S.C. §1161 For Federal Review Of Tribal Liquor Ordinances Is Further Evidence Of Federal Preemption.

Section 1161 provides that the Secretary of Interior certify and publish tribal liquor ordinances adopted "by the tribe having jurisdiction over such area of Indian country." In the certification process, the Secretary routinely reviews and approves the ordinance. By inserting this provision, Congress established federal review of tribal authority under §1161 to lift the absolute prohibition of the Indian liquor laws.

Recently, in Merrion, 448 U.S. 160, this Court reviewed a tribal oil and gas severance tax to determine whether it violated the Interstate Commerce Clause. The Court found that its review of the tribal severance tax was necessarily limited in scope because Congress had affirmatively acted, pursuant to its authority under the Indian Commerce Clause, to establish a

series of "federal check-points" to insure that the exercise of tribal authority was consistent with the congressional scheme under the Indian Reorganization Act, 25 U.S.C. §§476, 477. Id., 71 L Ed 2d at 40-41. In Merrion, as in the case at bar, one of the federal check-points was Secretarial approval of the tribal ordinance which authorized the tax. The Court found that the tax ordinance had received the requisite Secretarial approval and, therefore, "[t]his course of events fulfilled the administrative process established by Congress to monitor such exercise of tribal authority." Id.

This case is closely analogous to Merrion because Congress through §1161 has affirmatively acted to establish an administrative process to monitor the exercise of tribal authority. The Court of Appeals observed that the Secretarial review required by §1161 was a congressional indication "that the regulatory authority of

the tribes which was the subject of §1161 was safeguarded by federal supervision." Rehner, 678 F. 2d at 1349.

Here there is no question that the Pala Band's liquor ordinance was passed in accordance with the congressional scheme established by 18 U.S.C. §1161, and that the Secretary has similarly reviewed and approved other more detailed tribal liquor ordinances (see Rehner at 1342 [discussing the liquor ordinances of the Tulalip and Muckleshoot Tribes]) without any qualification that state licensing jurisdiction applies to the same conduct authorized by tribal law. On the contrary, the official position of the Secretary has consistently rejected any such reading of the statute. See discussion, supra, at Section II. This Secretarial review process, accompanied by the federal enforcement power, is a significant factor demonstrating persistent federal presence and vigilance where Indian country liquor transactions are concerned.

V. IMPOSITION OF A STATE LICENSING REQUIREMENT ON INDIAN RETAILERS SUCH AS MRS. REHNER WILL DIRECTLY INTERFERE WITH TRIBAL SELF-GOVERNMENT.

A. 18 U.S.C. §1161 Established The Conditions Under Which Indian Tribes Could Exercise Their Inherent Preexisting Power Over Indian Liquor Trade Within Indian Country And Delegated A Share Of The Preemptive Federal Power Over Such Trade To The Tribes.

Petitioner asserts residual state authority extending to the licensing of all liquor traffic within its borders, even in Indian country. Indeed, petitioner maintains that §1161

> . . . was not a matter of Congress conferring authority on the states over liquor traffic with Indians, it was a matter of increasing the scope of that authority.

P.B. at 43.

Petitioner's statement is persuasively rebutted by the plenary power that Congress has exercised over liquor transactions with Indians, regardless of state lines, since the earliest years of this nation. See Section IV(A), supra, and cases cited

therein at pp. 47-50.

The jurisdiction that petitioner baldly asserts is not an inherent aspect of state police power, nor does it spring from a grant or transfer of federal power. Prior to the imposition of federal laws restricting liquor traffic with Indians, the Indian tribes retained full inherent power, as a fundamental attribute of their sovereign status, to regulate liquor transactions with their members and within their territory. It was their inability to deal with the tragic and devastating effects of this new substance -- a substance foreign to their history and culture -- that led to the imposition of federal control. Significantly, "the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson" complaining of the disastrous effects of this "fatal poison" upon his people. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 306 (1982 ed.).

Congress has never divested tribes of their inherent power to regulate the activities of their members, United States v. Wheeler, supra, 435 U.S. 313, including the sale and distribution of liquor within their territory. The passage of the federal Indian liquor laws, however, required that this aspect of inherent tribal power yield to superseding federal power under the Indian Commerce Clause. As a result, inherent tribal power over liquor lay dormant [11] under preemptive federal control for more than a century -- and remains so today on those reservations where the absolute ban of the federal Indian liquor laws has not been lifted -- until Congress enacted §1161 in 1953. By enacting §1161, Congress provided a mechanism for removal, under certain conditions, of the federal

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11. ". . . sovereign power, even when unexercised, is an enduring presence . . ., and will remain intact unless surrendered in unmistakable terms." Merrion, supra, 71 L. Ed 2d at 36.

impediment, imposed by the federal Indian liquor laws, to the exercise of this inherent tribal power. [12/] The Court of Appeals agreed that the statute reflects congressional recognition of this inherent tribal power:

> A close reading of the statute then reveals that Congress recognized the tribes' jurisdiction over liquor transactions . . .

Rehner, 678 F. 2d at 1345. But Congress also went further by specifically delegating to the tribes a share of its own power to regulate liquor transactions in Indian country. See Mazurie, 419 U.S. at 553-54.

Thus, in Mazurie, when confronted with a direct challenge to the congressional

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12. Congressional acknowledgment that the tribes possess such authority over their members and territory, independent of a grant or delegation of Congressional power, is found in the phrase "tribe having jurisdiction over such area of Indian country . . ." See 18 U.S.C. §1161. This inherent authority has "not been divested by Congress or by necessary implication of the tribe's dependent status." Colville, 447 U.S. at 152.

power to regulate liquor transactions by non-Indians within Indian country, the Court faced the issue squarely and concluded that

> . . . federal authority was properly delegated to the Indian tribes. We conclude that federal authority is adequate, even though the lands were held in fee by non-Indians, and even though the persons regulated were non-Indians.

Id. Not only was this broad delegation of authority proper, it was also vested in tribal entities that possessed independent authority over the subject matter. This is made explicit by the following statement:

> . . . when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. * * * It is necessary only to state that the independent tribal authority is quite sufficient to

> protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." [Emphasis added.]

Id. at 557.

B. Application Of The California Liquor Licensing Scheme To Mrs. Rehner's On-Reservation Activities Will Directly Interfere With A Tribal Governing Process That Is Specifically Sanctioned By Congress.

Allowing California to license liquor sales by Mrs. Rehner could totally frustrate the Pala Band's decision to lift the federal prohibition against the sale of liquor on the Pala Reservation. Since the California licensing scheme is a "quota" system, a license may not be available even if an applicant meets other licensing criteria. Even if a license were available, the State could refuse issuance for a wide variety of reasons. Or an applicant, like Mrs. Rehner, might simply lack the funds to purchase a state liquor license on the open market if none were available through the State's lottery/quota system. See discussion below.

This Court in White Mountain Apache Tribe, 448 U.S. 136, held that a state's interference with tribal self-government "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id., 448 U.S. at 143. Though the Court of Appeals found it unnecessary to reach this issue because of its determination that §1161 has preemptive effect (see Rehner, 678 F. 2d at 1349 n. 18), it is a sufficient alternative basis for precluding state licensing of Mrs. Rehner.

A review of the California liquor scheme demonstrates that it comes into direct conflict with the Pala Band's authority to decide whether or not liquor can be sold on the Pala Reservation. The number of licenses that are issued are limited by the State (one per 2500 inhabitants of each county). California Business & Professions Code §23817 (hereinafter "B.&

P. Code"). The application for a general off-sale license must be accompanied by a fee of $6,000.00. [13/] B.& P. Code §23954.5. One lottery per county is held each year if there are more applicants than licenses available (a typical situation); and numbers drawn in the lottery determine "priority to be given to the consideration of [an]

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13. The united States in its amicus brief before the Ninth Circuit characterized this license fee as "blatantly a tax imposed on the privilege of engaging in the liquor business." Brief For The United States As Amicus Curiae, p. 17. The proceeds from license fees are not targeted for administration of state liquor laws but are deposited in the State's general fund. B. & P. Code §23954.5. Similar state taxes were struck down in the context of state attempts to license and tax non-Indians doing business on a reservation in White Mountain Apache Tribe, supra, (motor carrier license tax) and Ramah, supra, (gross receipts tax). In White Mountain Apache this Court observed:

> We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme . . .

Id., 448 U.S. at 150. See, also, Ramah, supra, 73 L. Ed 2d at 1184.

application; but shall not insure the issuance of a license . . ." B. & P. Code §23961. Upon receipt of an application for a license, written notice of the application is required to be given to the sheriff, chief of police, and district attorney of "the locality in which the premises are situated, if in unincorporated territory, and to the city council or other governing body of the city in which the premises is situated . . ." B. & P. Code §23987. Protests may be filed to the issuance of a license. If a public officer or agency, or the governing body of a city or county, protests, a hearing must be held. B.& P. Code §24013. Issuance of new liquor licenses, and inter-county transfers of existing licenses, are based on population increases; this limitation is tied to §23817's limit of one license per 2500 inhabitants. B. & P. Code §§23817 and 23821. Because of the strict limitations on new licenses, there is an active market for

the sale and transfer of existing licenses. At the time that Mrs. Rehner filed her complaint in 1977, the fair market value of a state liquor license was approximately $55,000. J.A. 9. The California liquor license fee requirement and lottery/quota scheme raise formidable, if not insurmountable, regulatory and economic barriers to obtaining a state liquor license. Moreover, the potential involvement of and deference given to city and county governments and officials under the statutory scheme would be particularly intrusive and could

> . . . altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities.

Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 664.

Petitioner asserts that permitting the coexistence of state and tribal licensing

jurisdiction in Indian country will promote equality among Indians and non-Indians, [14] and will eliminate the discriminatory effect of the federal Indian liquor laws. P.B. at 37-38. [15] Imposing the full scope of state liquor licensing jurisdiction on reservation Indians and activities distorts the language and intent of §1161. Such an argument also ignores recent decisions by this Court that have rejected state licensing and regulation of tribal members. See e.g., Moe, 425 U.S. at 480-81; McClanahan, 411 U.S. at 173, 179; Bryan, 426 U.S. at 390.

Even though the Pala Tribal Council has

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14. The assimilationist argument made by petitioner as a basis for subjecting reservation Indians to the full panoply of state liquor laws is similar to that made and expressly rejected in Santa Rosa Band of Indians v. Kings County, supra, at 661.

15. The actual effect of imposing state licensing authority could very well perpetuate the kind of discrimination that provided the impetus for passage of §1161. California's license quota system could result in "dry" (no liquor vendors) Indian reservations in an otherwise "wet" state.

determined, in accordance with the provisions of §1161, that liquor can be sold on the Pala Reservation, petitioner would attribute to Congress an intent to impose a state licensing scheme that could totally nullify that determination. Such a result cannot possibly be squared with the language or intent of §1161, or with traditional notions of tribal sovereignty and self-government. As Bryan points out, such imposition of state regulatory power could "result in the undermining or destruction of . . . tribal governments . . . and a conversion of the affected tribes into little more than 'private voluntary organizations.'" Id., 426 U.S. at 388.

VI. THE COURT OF APPEALS PROPERLY HELD THAT STATE AUTHORITY UNDER THE TWENTY-FIRST AMENDMENT HAS NO ROLE TO PLAY IN INDIAN COUNTRY.

A. The Twenty-first Amendment Did Not Increase State Jurisdiction.

Though this Court has recognized that the Twenty-first Amendment imposes some

limitations on Congress' power to regulate interstate commerce, it has expressly held that the Amendment did not increase state jurisdiction over areas under federal control. Collins v. Yosemite Park Co., 304 U.S. 518, 538 (1938); United States v. Tax Commission of Mississippi, 421 U.S. 599, 613 (1975). In United States v. Tax Commission of Mississippi, this Court further held that state jurisdiction over liquor transactions under the Twenty-first Amendment did not depend upon whether a particular federal reservation is subject to "exclusive" or "concurrent" federal jurisdiction. Id. at 613-614. In upholding the continuation of federal tax immunities for liquor destined for delivery on a military base which was subject to "concurrent" jurisdiction, the Court flatly rejected the application of Mississippi's tax laws. Id.

Even as to interstate commerce, the State's authority, as petitioner readily admits (P.B. at 88), is subject to constitu-

tional restraints. See, e.g., Larkin v. Grendel's Den, Inc., 5 U.S.L.W. 4025, 4027 (December 13, 1982); California Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 106-14 (1980); Craig v. Boren, 429 U.S. 190, 204-206 (1976). In Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964), this Court reviewed many of the cases cited by New York in that case for the proposition that the Twenty-first Amendment effectively repealed the Commerce Clause as to regulation of liquor and held that such an implied repeal was an "absurd over-simplification" and would have left Congress with "no regulatory power over interstate or foreign commerce in intoxicating liquor." Id., 377 U.S. at 331-32. The Court also reiterated the principles established in Collins v. Yosemite Park Co., supra, 304 U.S. 518, and later affirmed in Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944), and United States v. Tax Comm'n. of Mississippi, supra, that federal areas

within a state were not considered to be a state or territory within the meaning of the "delivery or use therein" language of the Amendment.

Petitioner suggests that despite the express holdings of these cases this Court should engage in a balancing of tribal, federal and state interests in resolving the issue in this case. Hostetter itself provides a partial response to the petitioner's balancing argument. There the Court held that conflicts between a state's regulatory power under the Twenty-first Amendment and the command of other constitutional provisions must be considered "in the context of the issues and interests at stake in any concrete case." Id., 377 U.S. at 332. Respondent disavows the appropriateness of such a balancing test where the State seeks licensing authority over a reservation Indian; but even if such a balancing test were applied, the State's interests could not prevail over the

significant federal and tribal interests at stake in this case. Here the state is asserting regulatory power over subject matter [Indian country liquor transactions] and persons [reservation Indians] where federal control has historically excluded any exercise of state jurisdiction.

Any balance between federal, tribal and state interests was struck by Congress when it enacted §1161, some twenty years after adoption of the Twenty-first Amendment. This balance preserves exclusive federal/tribal jurisdiction while requiring that "acts or transactions" involving liquor in Indian country be in harmony with basic state policies regarding the control of intoxicating liquor. If this balance should prove to be unwieldy or unsuccessful in application, it is for Congress, not this Court, to make the necessary adjustments.

A. In Enacting 18 U.S.C. §1161 Congress Was Fully Aware Of The Limited Scope Of State Regulatory Power Under The Twenty-first Amendment.

Petitioner argues that construing §1161 in light of the Twenty-first Amendment leads inevitably to the conclusion that Congress intended to permit state regulation of liquor transactions in Indian country. P.B. at 46, 50. To reach this conclusion would require this Court to ignore (1) the clear import of its early decision in Collins v. Yosemite Park Co., supra, 304 U.S. 518, decided prior to passage of §1161 and five years subsequent to passage of the Twenty-first Amendment; (2) the fact that the federal government had for more than a century prior to §1161 exercised exclusive authority over liquor traffic in Indian country; and (3) the absence of any mention of the Twenty-first Amendment, and of any discussion concerning state licensing and distribution jurisdiction over liquor, in the legislative history of §1161. 16/ (footnote on next page)

Petitioner's assertion that Congress in 1953 recognized the "states' plenary authority over liquor traffic within their borders" (emphasis added; P.B. at 46) assumes a Congress ignorant of its power and uninformed as to the prevailing case law. Such an assumption cannot stand; Congress, like all persons, is presumed to know the law. Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979). [17] In enacting §1161 Congress had every reason to believe that neither the states' general police power nor the Twenty-first Amendment had anything to do with regulation of liquor in Indian country.

In 1938, this Court had determined that

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16. The Court of Appeals found this to be "[p]erhaps the most compelling feature" of §1161's legislative history. Rehner, 678 F. 2d at 1347.

17. ". . . it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." Id. at 699.

the Twenty-first Amendment did not authorize state seizure of a liquor shipment to a national park or the enforcement of state permit and tax laws against the park's liquor concessionaire. Collins, supra, 304 U.S. at 538. The Court said:

> The lower court was of the opinion that though the Amendment may have increased "the state's power to deal with the problem ..., it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

This decision predated §1161 by fifteen years and remains the authoritative decision

on the question of whether state jurisdiction under the Twenty-first Amendment applies in areas subject to federal control. More recent decisions of the Court have confirmed its continuing vitality. See, e.g., United States v. Tax Comm'n of Mississippi, supra, 421 U.S. at 613 (1975); Johnson v. Yellow Cab Transit Co., supra, 321 U.S. 383.

Congress was also acutely aware of the exclusive and, in certain aspects, oppressive nature of the federal government's comprehensive and exclusive regulation of matters relating to the interests and property of Indian people. This perception by Congress is reflected in the fact that the impetus for enacting §1161 was to eliminate the admittedly discriminatory effect of various federal laws, including the federal Indian liquor laws. See Hearings on H.R. 1055 before the House Committee on Interior and Insular Affairs. (P.B., Vol II at A-52, A-53).

If the State's authority to regulate liquor under the Twenty-first Amendment was as "plenary" as petitioner asserts, there would have been little inducement or need for Congress to concern itself with a federal scheme that, under petitioner's analysis, could not have prevailed over state regulatory power under the Amendment. Even those amici states who offer their views in support of petitioner cannot concur with this absurd contention:

> Prior to the enactment of §1161, virtually all sale and possession of liquor within Indian country was banned under federal law. [Citations omitted.] The practical effect of this ban was that no room was left for state or tribal regulation. [Emphasis added.]

Amicus Br. of State of Minn., et al. at 11.

Moreover, if Congress believed the Commerce Clause had been repealed by the Twenty-first Amendment and that it was absolutely bound by state liquor laws, it would not have provided in §1161 for the

continued application of federal laws which prohibited liquor introduction, distribution and possession in Indian country regardless of whether the surrounding state was "wet." And in the years between adoption of the Twenty-first Amendment and §1161, Congress would not have repeatedly legislated on the subject of liquor in Indian country without regard to whether state law permitted or prohibited the conduct with which it was concerned. See, e.g., 18 U.S.C.A. §§1154, 1156, and Reviser's Notes. Whatever authority Congress may have thought the Twenty-first Amendment gave states in interstate commerce transactions, it had no reason to believe its plenary authority over Indian commerce had been altered.

It is also noteworthy that, in 1953, the State of California itself was aware of its lack of jurisdiction over liquor transactions involving Indians both within and without areas of Indian country within the state. Representative Engle, one of the

members of the House of Representatives Committee on Interior and Insular Affairs stated during consideration of H.R. 1055 (eventually enacted as §1161) that California's repeal of its own law prohibiting the sale of liquor to Indians had not changed the federal Indian liquor prohibition:

> I made a check on the situation to see whether or not Federal regulations would apply exclusively upon Indian territory, and much to my surprise I found out that Federal law is broad enough so that you could hardly sell liquor to an Indian anywhere and be safe, whether it was on a reservation or not.

P.B., Vol. II, Appendix C at A-74.

In light of the myriad cases decided under the Indian Commerce Clause in general, and under the federal Indian liquor laws in particular, Congress when it enacted §1161 must be assumed to have understood the law on its plenary authority over Indian people and Indian commerce. Cf. Cannon v. Univer-

sity of Chicago, supra, 441 U.S. at 696-99 [Congress' knowledge of existing law]. If it had believed that the states' interests and power under the Twenty-first Amendment were overriding, as petitioner asserts, it would have demonstrated this by mentioning the Amendment in its consideration of §1161 or would otherwise have taken action consistent with such recognition. It is revealing, as well as fatal to petitioner's argument, that Congress did neither.

VII. PETITIONER'S UNFOUNDED FEARS OF REGULATORY ENFORCEMENT PROBLEMS PROVIDE NO BASIS FOR REVERSING THE COURT OF APPEALS.

A. The Record Does Not Support Petitioner's Representation That Tribal And Federal Regulation Of Indian Country Liquor Transactions Is, Or Will Be, Ineffective Or Irresponsible.

Petitioner argues that the Court of Appeals' decision "renders the criminal sanctions virtually unenforceable" and declares that the results of the decision will be "unworkable" for a variety of reasons (P.B. at 74), devoting an entire

section of its brief to hypothesizing possible insoluble problems that it claims will inevitably arise. See, generally, P.B. at 67-81.

This case was decided solely on the pleadings in the district court on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) without presentation of matters outside the pleadings that might have transformed it into a FRCP 65 summary judgment motion. See, Judgment, J.A. 18. It is difficult to respond to many of petitioner's arguments without the benefit of a factual record. Of course, the general rule is that, on a motion to dismiss, plaintiff's pleadings are accepted as true and the allegations therein construed in favor of plaintiff, and factual issues outside the pleadings are not considered. Cannon v. University of Chicago, supra, 441 U.S. at 681; Carter v. Stanton, 405 U.S. 669, 671 (1972); 5 Wright & Miller, Federal Practice and Procedure, §1357 at

594-96 (1969).

Petitioner has attempted to expand this narrow licensing case to one of broad import concerning conjectural regulatory enforcement problems. While respondent entertains some doubts as to the propriety or wisdom of considering such issues in this context, prudence requires some response to petitioner's allegations.

B. The Actual Experience With Tribal Regulation Of Liquor In Other States Does Not Support The Hypothetical Problems Raised By Petitioner.

The most effective rebuttal to petitioner's fears is to look to the situations where proprietors on Indian reservations are not required to obtain state liquor licenses. The primary example is in the Tenth Circuit, where, as a result of the decision in United States v. New Mexico, supra, 590 F. 2d 323, the Mescalero Apache Tribe has operated its Inn of the Mountain Gods for several years without a state liquor license. As pointed out in the

Mescalero Tribe's amicus brief in the instant case, the problems envisioned by petitioner have simply not developed. 18/ The Mescalero situation illustrates methods by which tribal and state governments, meeting and cooperating on matters of mutual concern, may resolve many of the problems feared by petitioner. Additionally, although factual details are not in our record, the lack of any amicus brief or subsequent reported litigation may imply that a similar accommodation has been reached in North Dakota, subsequent to the 1977 decision in Zaste v. North Dakota, Civil No. A1-75-29 (D.N.D. 1977), which struck down state liquor license requirements on Indian reservations in that

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18. It is interesting to note that New Mexico did not participate as an amicus in the instant case along with the other states who filed briefs in support of petitioner. The State of Washington also chose not to file an amicus brief on the merits, presumably as a result of the settlement it reached with the Muckleshoot Tribe, as discussed below.

state.

Also illuminating are the compromise solutions that have been and are being worked out elsewhere. Chief among these is the State of Washington's settlement with the Muckleshoot Tribe, as detailed in that Tribe's amicus brief. In addition, the State of Montana has adopted a temporary policy which allows the Confederated Salish & Kootenai Tribes to operate a reservation liquor outlet without obtaining a state liquor license (see Amicus Curiae Brief Of The State of Montana at 5-6, n. 8); and that state, while still apprehensive, reports no operational problems in its brief.

Thus, rather than making an attempt to rebut petitioner's hypothetical problems with equally hypothetical possible solutions, respondent merely observes that other states have apparently been able, or feel confident in their ability, to work out any problems as they arise. It is also significant, in light of petitioner's unbased

representations to this Court, that none of the amici in support of petitioner has pointed to any facts demonstrating that tribal regulation of reservation liquor sales has been irresponsible. On the contrary, those amici focus primarily on public policy and economic interests that they hypothesize will be impaired or frustrated by tribal regulation of the sale and distribution of liquor in areas of Indian country within their respective states.

C. The California Legislature's Acquiescence To The Court Of Appeals' Decision Undercuts Petitioner's Arguments That Tribal/Federal Regulation Of Reservation Liquor Is Unworkable.

Petitioner's argument that the Court of Appeals' decision is "unworkable," and that California cannot realistically cope with the results of the decision (see, e.g., P.B. at 67-81), also ignores the fact that the California Legislature recently passed an amendment to B. & P. Code §23384, which added persons engaged in the liquor business

on Indian Reservations to the list of non-licensees eligible to buy liquor from California wholesalers. Chapter 906, 1982 Calif. Legis. Serv. 4913 (West). Under applicable California law, the passage of that amendment signified an acquiescence to and acceptance of the Court of Appeals' decision in this case. It further indicates that the Legislature did not consider the potential problems to be insurmountable, and that California felt capable of working out any problems on a case-by-case basis as they arose.

Respondent, in her Brief in Opposition to Certiorari, argued that passage of the amendment effectively mooted the controversy by showing that California's legislative and executive branches had conceded the State's lack of authority to license Indian reservation liquor traders. Petitioner fails to address the impact of Chapter 906 in its brief, but respondent continues to believe that enactment of that

bill clearly indicates the Legislature's intent to acquiesce in the Court of Appeals' decision. Whether the passage of the bill completely moots the case or not, it seriously weakens many of petitioner's arguments by showing that the Legislature itself was not convinced of the seriousness of the dangers and problems envisioned by petitioner.

In enacting Chapter 906, the Calfiornia Legislature clearly accepted the Court of Appeals' decision:

> It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provisions that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesed in the previous judicial construction.

Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 734-35; 180 Cal. Rptr. 496, 504-5; 640 P. 2d 115, 123 (1982). Although §1161 is of course not part of California's statutes,

the Legislature's decision by necessary implication invalidated California's provision requiring all retail sellers of liquor to obtain a state license. See, B. & P. Code §23300. The wholesaler's provisions that were recently amended, B. & P. Code §23384, are a part of that general statute dealing with the licensing of liquor sellers.

As in Marina Point Ltd. v. Wolfson, supra, and Cannon v. University of Chicago, supra, 441 U.S. 667, the presumption of legislative knowledge is actually unnecessary since here the legislative documents establish beyond question that the California Legislature was aware of the decision in Rehner and enacted the new law in direct response to it. See, Staff Analysis of Senate Bill 1888, Appendix A-1 to Respondent's Brief in Opposition to Certiorari ["This bill is . . . in response to the recent court decision in Eva Reiner (sic) v. ABC."] This action "represents a

legislative endorsement" of the decision in this case. Marina Point, Ltd. v. Wolfson, supra, 30 Cal. 3d at 735.

Such a responsive legislative act often moots the underlying case. Kremens v. Bartley, 431 U.S. 119 (1977); Johnson v. Mississippi, 586 F. 2d 387 (5th Cir. 1978). Even if it does not go that far, the Legislature did authorize state liquor wholesalers to sell to reservation retailers who do not have a state liquor license. This act removed the state licensing requirement as to on-reservation liquor retailers, and also indicates a legislative judgment that such a liquor distribution system would not present insurmountable administrative or enforcement problems.

In addition, at the time of the bill's passage, the committee report indicated "no known opposition," presumably including opposition from petitioner's agency, the California Alcoholic Beverage Control Department. Such departmental silence and

legislative acquiesence imply a far different state of affairs than that painted in petitioner's brief. Instead of a scenario of total decontrol and chaotic reservation liquor trade unrestrained by laws or standards, it implies a far more positive view of the situation. The fact that Chapter 906 was enacted without even passing opposition by the very department that petitioner directs graphically reveals the hypothetical nature of the rhetoric that petitioner so freely employs to disparage tribal governing capacity. This Court should address this case on its facts, not on petitioner's imagined fears.

CONCLUSION

For these reasons, the decision of the Court of Appeals reversing the District Court and holding that the State of California has no authority to require respondent, a reservation Indian, to obtain a state liquor license, should be affirmed.

Respectfully submitted,

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January 27, 1983

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No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

California is not asserting that by virtue of 18 U.S.C. section 1161, it has jurisdiction in a criminal or civil sense over an Indian retailer in Indian country, but that its laws, including its licensing laws, set the ground rules for lawful liquor transactions, just as the tribal ordinance sets the ground rules for lawful operation of liquor traffic in Indian country by non-Indians. Jurisdiction is vested only in the United States. If California's licensing laws need not be followed, then a double standard is created, and that is sanctioned neither by the wording of section 1161 or its history.

The Department of Interior has not adhered to a consistent position regarding section 1161, and neither respondent nor the United States has shown how their interpretation of section 1161 would work.

ARGUMENT

I

CONSIDERATION OF NON-INDIAN RETAILERS OPERATING IN INDIAN COUNTRY DISCLOSES THAT CONGRESS DID NOT INTEND TO PREVENT THE STATES FROM EXERCISING THEIR LICENSING AUTHORITY THEREIN

Respondent, who sought a California liquor license in this case, is an Indian, but 18 U.S.C. section 1161, the statute involved in this case, says nothing about Indian retailers. The statute speaks of "act or transaction;" the seller is not identified. The buyer need not be Indian either. Nor do the applicable statutes require the location of the act or transaction be land owned by Indians or held in trust for Indians by the United States. Indian country often includes non-Indian land. See United States v. Mazurie (1975) 419 U.S. 544, 550-52; see also 18 U.S.C. §§ 1151, 1154, and 1156. See generally Seymour v. Superintendent (1962) 368 U.S. 351.

Martin and Margaret Mazurie, both non-Indians, owned and operated the Blue Bull, located on non-Indian owned land (their own) within Indian country of the Wind River Reservation. The population of the area included both Indians and non-Indians. United States v. Mazurie, supra, at 546 - 47.) If the arguments of the United States and respondent are accepted, then the inevitable result is that the states would have no control at all about how a non-Indian on non-Indian land and selling liquor to non-Indians conducted his liquor business. It is petitioner's position that by no stretch of the imagination can it be concluded that Congress intended such a situation to arise.

The United States seeks to prevent the Court from considering these matters by attempting to limit the Court's examination of section 1161 to the facts of this case:

a small general store operated by an Indian on Indian owned land in a remote area of San Diego County. (Br. U.S. p. 7.) But the United States also admits that section 1161 is a statute of nationwide applicability. (Br. U.S. p. 3.) Because this statute is of nationwide applicability and the case involves interpretation of that statute, a proper interpretation must include examination of factors beyond those presented by the facts of the case before the Court.[1/]

The last, and indeed only time, the Court has "visited"[2/] this area of the law was in Mazurie in 1975, and it is quite useful to return to that case now. The Mazuries were charged with and convicted in

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1. The Court of Appeals, in contrast to the United States, recognized the broad scope of section 1161 when it referred to "Indian country liquor transactions." (Petn. Append., p. A-1.)

2. Br. U. S. p. 7.

a federal court of a violation of section 1154 for selling liquor without a tribal license. A number of observations are in order.

First, the United States had "jurisdiction" over the Mazuries to criminally prosecute them. But because the Mazuries were not Indians, the Wind River Tribes could not prosecute them criminally for a violation of its tribal ordinance. (Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191.) In other words, the tribe did not have "jurisdiction" over them.[3/]

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3. For this reason, the reference by the United States to the phrase in section 1161 ". . . an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country" (Br. U.S. p. 13) does not advance its argument. The word "jurisdiction" merely aids in identifying the relevant tribe just as the phrase "in which such act or transaction occurs" aids in identifying the relevant state. Furthermore, "jurisdiction" is used in relation to land -- Indian country -- and

Yet the tribe could require them to obtain a tribal license, and their failure to obtain one resulted in the United States exercising its jurisdiction over them. What is crucial is that this result was reached without a tribe having criminal or civil jurisdiction over a non-Indian or section 1161 conferring criminal or civil jurisdiction onto the tribe.

The same is true of the reverse situation. The state is not claiming criminal or civil jurisdiction over respondent or that section 1161 is a grant of jurisdiction so that it could later criminally prosecute her for anything.[4/] California law, like Wyoming law and the

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Footnote 3 Cont.

not in relation to people. Neither passage therefore is a grant of power over anyone or changes in anyway the relative powers of the state or the tribe.

4. Accordingly, the state's power under Public Law 280 is not considered and

Wind River tribal ordinance, requires a state license, and respondent's failure to obtain one should likewise result in the United States exercising its jurisdiction over her.

Mazurie is instructive on another point. Respondent and the United States argue that the phrase "in conformity" in section 1161 does not mean compliance with a state's licensing laws, only its substantive standards. (Res. Br. pp. 21-26; Br. U.S. pp. 18-20.) The phrase "in conformity" however, modifies both the reference to state laws and the tribal ordinance equally. If "in conformity" is read to mean something less than a

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Footnote 4 Cont.

in fact, Public Law 280 was never advanced by petitioner as a basis for its refusal to issue respondent a license. For this reason, the case does not, as the United States suggests, return to the area of a state's regulatory powers last visited in

licensing law, the Mazuries could not have been convicted of violating section 1154 since their only offense was a failure to obtain a tribal license.

For respondent and the United States to succeed in this case, the court must find a double standard. According to respondent and the United States, an Indian retailer is subject only to a state's substantive standards, not its licensing laws, but a non-Indian retailer is subject to the tribe's licensing laws. Where can this double standard be found? It certainly cannot be found in the language of section 1161. The requirements imposed by Congress to avoid prosecution are placed on any "act or transaction" without regard

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Footnote 4 Cont.

1976 in Moe v. Confederated Salish & Kootenai Tribes, (1976) 425 U.S. 463; and Bryan v. Itasca County (1976) 426 U.S. 373. (Br. U.S. p. 7.)

to the identity of the actor and the word "both" modifies state law and a tribal ordinance. From the words Congress employed, the clear meaning is that if the Mazuries committed a federal crime for selling liquor without a required tribal license, then respondent likewise will commit a federal offense if she sells liquor in California without a required California license.

Nor does this double standard appear in the legislative history. That history was reviewed in the opening brief (Petn. Br. pp. 31-38)[5/] and shows that Congress intended to remove ancient discrimination against Indian liquor comsumers. In other words, the legislative history discloses not only no evidence of an intent to create a double standard, but

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5. Respondent has not shown this review to be inaccurate. (Res. Br. pp. 40-46.)

evidence of an intent that no such double standard be created. Based upon the words of section 1161 and its legislative history, the notion of a double standard should be rejected.

What is needed is an interpretation of section 1161 which makes sense, given the words used and the statute's legislative history, and that interpretation would treat respondent like the Mazuries. Respondent and the United States argue this construction violates the principle that Congress must clearly intend to grant to a state jurisdiction over reservation Indians, and that absent such expressed intent, the states may not require reservation Indians to obtain state licenses. But this interpretation again fails to consider a situation like that presented in Mazurie.

The Mazuries were non-Indians who sold liquor to both Indians and non-Indians from non-Indian owned land. There is no question but if these acts occurred outside Indian country, Wyoming would have the authority under the Twenty-First Amendment to regulate them. Under respondent's and the Court of Appeals' view of section 1161, once the Mazuries entered Indian country, Wyoming lost its power over them to require them to obtain a state license. The question then arises: Did Congress intend to divest the states of their rights under the Twenty-First Amendment to regulate the sale of liquor by non-Indians within their borders because such activity took place within Indian country? A further question is whether Congressional silence on this matter is sufficient to divest the states of this authority, since nowhere in section 1161 or its legislative history is there

the slightest hint that the states will lose their authority over non-Indians.[6/]

An interpretation which treats respondent and the Mazuries the same, and which treats the tribes and the states fairly, is the most reasonable one. Such an interpretation allows the state to require licenses of Indians retailers, just as it allows the tribe to require licenses of non-Indian retailers. The states and the tribes thus set the ground rules for lawful operation of liquor transactions in Indian country, and such ground rules may require licenses. To compel compliance with these ground rules, the United States retains criminal jurisdication over Indians and non-Indians alike. Such a system is

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6. A final question which need not be considered in this case is whether Congress had the power to divest the states of their authority over non-Indians reserved to the states by the Twenty-First Amendment.

created by petitioner's interpretation of section 1161 and is the proper one.

* * * * *

II

EARLY ACTIONS BY THE DEPARTMENT OF INTERIOR SUPPORT THE POSITION THAT INDIAN RETAILERS WERE REQUIRED TO OBTAIN STATE LIQUOR LICENSES

Pointing to a 1971 Department of Interior Opinion ("Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. [illegible], 43 [February 3, 1971]), respondent argues the position therein advanced, which is consistent with respondent's position, is entitled to great weight and should be followed. (Res. Br. pp. 29-35.) An examination of that opinion reveals a complete switch taken on the position by the Department of Interior shortly after section 1161 was enacted. Indeed, the opinion admits as much:

> "We realize that the Chippewa Cree ordinance indicates that all laws governing the sale of intoxicating beverages in Montana

> apply on the Rocky Boy's Reservation. However, this tribal interpretation of law, with which the tribe now apparently disagrees, cannot confer jurisdiction on the State of Montana." (Opinion of the Solicitor, Dept. of Interior, Vol. 2 p. 2029.)

The Department approved that ordinance on April 28, 1954, about nine months after section 1161 was enacted. (19 Fed. Reg. 2572.) So this "tribal interpretation" was a very early one. Further, it was probably not just an interpretation by the tribe, but by the Department as well, for the Department had to approve the ordinance and the Department approved the Wind River Tribes' ordinance (United States v. Mazurie, supra 419 U.S. at 547-48) and the Pala ordinance adopted by respondent's tribe in 1960 (J.A. p. 24). If the Department disagreed with

the tribal interpretations it presumably would have said so before approving them, and required a correction.

That until 1971, the Department acted with the view that a state could require Indian and non-Indian retailers to obtain state licenses if state law required them, becomes clear from the next paragraph in the 1971 Opinion:

> "In addition, we note that a former Solicitor, in a letter to Mr. John W. Stilley of the Arizona State Legislature, dated March 26, 1954, stated in answer to a hypothetical question that an Indian desiring to operate a bar on a reservation would have to obtain a state license. . . . In any event, the views expressed in the 1954 letter of the Solicitor will not be followed to the extent that

they conflict with any of the statements and conclusions contained in this opinion."

The conclusion that the Department changed its position substantially in 1971 from its earlier views is fortified by an examination of an opinion dated September 22, 1954. (Opinions of the Solicitor, Dept. of Interior, Vol. 2, p. 1648.) A careful reading of that opinion appears to support the view that California's licensing laws are applicable in Indian country:

"There is, of course, absolutely nothing in the Act or in its legislative history to suggest that the Congress had any intent to influence the content of the liquor laws of any State. This is true, also, respecting the content of any tribal ordinance adopted pursuant to the Act. Indeed, the

> juxtaposition of the statutory references to the laws of the State and to the tribal ordinances and their inclusion in the same clause with the same absence of modifying or limiting words, indicate that the Congress intended that the scope of such a tribal ordinance is to be as much within the discretion of the tribe as the scope of the State liquor laws is to be within the discretion of the State. The scope of neither appears to be limited by the Act." (Id. at 1649.)

This passage and indeed the entire opinion makes no sense unless the full content of tribal ordinances and the full content of state liquor laws are applicable to Indian country liquor transactions.

There is not the slightest suggestion that the scope of the tribal ordinance is to be treated differently, or the scope of state laws restricted, under section 1161. Thus, it is reasonably clear that when section 1161 was enacted, the Department believed the tribal ordinance and state laws were to be treated the same, and each was to be followed

The Department's changing positions on another point bears some examination. The United States argues that Congress appears to have intended that the newly enacted tribal ordinances ". . . form the plenary authority under which Reservation liquor transactions might take place." (Br. U.S. p. 14.) That position, however, is inconsistent with the testimony of the Commissioner of Indian Affairs, Dillon S. Myer, before the House Subcommittee. (See Petn. Br. Append., A-13--A-32.) In support of the Interior Department's proposed

revision to H. R. 1055 (see Id. at A-18--A-20),[7] Commissioner Myer twice explained:

> "What [the bill] does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, and provide for tribal ordinances in case they do not want liquor on the reservation areas, where the state laws do not apply." (Emphasis added.) (Id. at A-21, see also A-26 -- A-27.) [8]

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7. This proposal was substantially incorporated in H. R. 1055, as subsequently reported out of committee. (See H. R. Rep. No. 775, 83d Cong., 1st Sess. at 1 (1953).

8. Similarly a Senate Report accompany H. R. 1055 states:

> ". . . if this bill is enacted, a State or local municipality or Indian Tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales

If the Department and Congress indeed intended that a tribal ordinance was necessary only to maintain prohibition or restrict liquor transactions on the reservation, and that Congress did not intend to condition removal of liquor prohibition upon the enactment of a tribal ordinance, then liquor transactions could occur without a tribal ordinance. It necessarily follows that Congress thus entertained no intention that a tribal ordinance form the plenary authority for lawful Indian country liquor transactions, and that such transactions were lawful under federal law as long as they conformed to state law.

Footnote 8 Cont.

> of intoxicants to Indians, they may do so." (Emphasis added.)

[S. Rep. No. 722, 83d Cong., 1st Sess. (1953).]

Perhaps the most noticeable change in position is the federal government's changing philosophy towards Indians in the last 50 years. It is interesting to note that respondent points to the 1934 Indian Reorganization Act, 48 Stat. 987 (25 U.S.C. § 476), and two later acts, the Indian Financing Act, Act of April 12, 1974, § 3, 88 Stat. 77 (25 U.S.C. §§ 1451 et seq.) and the Indian Self-Determination and Education Assistance Act, Act of January 4, 1975, § 2, 88 Stat. 2203 (25 U.S.C. §§ 450 et seq.), as examples of ". . . a policy that encourages Indians to govern themselves free from state control." (Res. Br. p. 11.) This is also quite deceiving. The Indian Reorganization Act was enacted during a period of time, between 1928 and 1942, in which federal policy was more tolerant and protective of Indian life and culture. Cohen, Handbook of Federal Indian Law

(1982 Ed.) pp. 144-52. Similarly, the latter two statutes were enacted during a period of time, commencing after 1961, when federal policy was similar to that between 1928 and 1942. (Id. at 180-206.)

However, between 1943 and 1961, federal policy was entirely different and in 1953, the year section 1161 was enacted, the official policy was assimilation. (Id. at 152.) This era included criticisms of earlier policy, transfers of functions from the Bureau of Indian Affairs to other federal agencies and the states, loss of Indian land to non-Indians, budget cuts, relocation, and enactment of legislation terminating federal supervision over many Indian tribes. Passage of section 1161 was part of the assimilation effort. (Id. at 152-80.) Viewed in this perspective, the notion that Congress intended to transfer regulatory control over liquor traffic in

Indian country to the states as well as the tribe, resulting in a reduced federal presence, is entirely reasonable.

* * * * *

III

RESPONDENT AND THE UNITED STATES HAVE FAILED TO PROVIDE A DEFINITION OF SUBSTANTIVE STATE STANDARDS

One of petitioner's reasons for believing Congress did not intend to draw any distinctions among state laws is the absence of any language in section 1161 suggesting such a distinction, and it was pointed out that the Court of Appeals failed to provide a definition of what is meant by "substantive state standards." (Petn. Br. pp. 18-30, 67-74.) Respondent and the United States have not failed to suggest any definition, they have added to

the confusion engendered by the Court of Appeals' use of that phrase.

At the outset of its argument, the United States asserts there is no issue in this case concerning state power to enforce its liquor laws by means other than a business privilege licensing requirement and that all that is involved is whether a state has the authority to require a tribal Indian to obtain a state liquor license. This appears to mean that an Indian retailer must satisfy all state laws except the one which requires possession of a piece of paper called a license, which need not be followed, and further suggests that the United States believes this case means nothing more than possession of a piece of paper.

However, at other parts of its brief, the United States makes it clear it believes other state laws need not be

followed in Indian country. (Br. U.S. pp. 17, n. 14, 26 & 26, n. 21.) But other than listing a few, the United States does not suggest how the difference between state laws which must be followed, and which state laws may be ignored, should be determined.

Not only does respondent also ignore this problem, she injects the concept of "basic state policies" into the discussion. (Res. Br. p. 78.) Respondent does not indicate whether "basic state policies" are synonymous with "substantive state standards" or if they are different, how they are different, and she does not suggest how basic state policies may be differentiated from non-basic state policies.

Perhaps at this juncture, an example is in order. The United States admits that California's proscription

against sales of liquor between 2:00 a.m. and 6:00 a.m. (Cal. Pen. Code § 398 [West 1983]) would be enforceable against Indian sellers. The Court of Appeals also characterized laws regarding hours of operation as substantive standards. (Petn. Append. p. A-10.) All would also agree that this is a type of restriction on the availability of liquor. Another statute restricting the availability of liquor is found in California Business and Professions Code section 23817 (West 1964), which ties the number of off-sale general licenses to population. According to respondent, this restriction is not a substantive standard. (Res. Br. p. 71.) Yet no one has explained how these conclusions are reached and why one is a substantive standard and the other is not. It appears very likely the only reasoning process employed is that one will know a

substantive state standard or a basic state policy when one sees it.

* * * * *

IV

RECENT CALIFORNIA LEGISLATION DOES NOT RENDER THIS CASE MOOT OR DEMONSTRATE ACQUIESCENCE IN THE COURT OF APPEALS' DECISION

Respondent's final argument is that a recent amendment to California Business and Professions Code section 23384 (West 1964)[9/] renders this case moot, or if not moot, demonstrates an acquiescence of the Court of Appeals' decision, and this acquiescence undercuts some of petitioner's arguments. (Res. Br. pp. 91-96.) Neither conclusion is correct.

California law strictly controls the activities of all its licensees. With

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9. All references in this argument will be to this Code unless otherwise indicated.

respect to beer manufacturers, wine growers, brandy manufacturers, rectifiers and wholesalers, sales of liquor may be made only to persons holding licenses authorizing the sale of liquor. (§§ 23357, 23358, 23360, 23368, 23378.) Section 23384, prior to its amendment in September, 1982, effective January 1, 1983, permitted these licensees to sell alcoholic beverages

> ". . . to nonlicensees having a fixed place of business or residence upon territory within this State which is maintained by the United States Government as a military or naval reservation or national park or veterans homes, and veterans homes maintained by the State of California."

One of the above-named licensees could, without jeoprdizing its license, sell alcoholic beverages to a non-licensee

only in accordance with section 23384. The 1982 amendment merely added non-licensees in Indian country to those persons to whom these licensees may sell alcoholic beverages. (Cal. Stats. 1982, Chap. 906, § 1, p. 180.) It is quite clear, then, that the amendment was designed for the benefit of these licensees by giving them the freedom to sell to non-licensed retailers in Indian country without fear that the Department of Alcoholic Beverage Control would take action against their licenses. Without this amendment, non-licensed retailers in Indian country would obtain their stock from outside California, which obviously would create an unfavorable economic situation to California liquor distributors.

California is in no sense now granting respondent a license to sell distilled spirits in this state. The

statutes relating to the issuance of licenses were not amended.[10] Respondent may be allowed to sell liquor in California without a license only if she is successful in this case. But if she is, the state has determined there is no reason to penalize its other licensees by closing off a potential source of business. If, on the other hand, petitioner is successful, respondent would not be permitted to sell distilled spirits because she does not have a license to do so. Thus, a live case or controversy remains.

* * * * *

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10. Respondent's assertion that the amendment removed the state licensing requirement for on-reservation liquor retailers is totally inaccurate, as is her assertion that it indicates a judgment that sales in Indian country do not present insurmountable administrative or enforcement problems. (Res. Br. p. 95.)

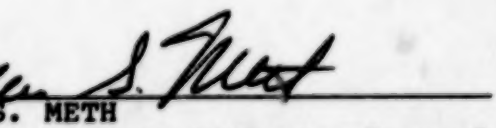
CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, petitioner respectfully submits that the decision of the District Court dismissing the complaint should be affirmed and the decision of the Court of Appeals should be reversed.

Dated: March 8, 1983

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the State of California
ALAN S. METH
Deputy Attorney General

By 
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SUPREME COURT OF THE UNITED STATES

No. 82-401, October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA REHNER,

Respondent.

CERTIFICATE OF SERVICE

I Alan S. Meth, the Attorney of record for Baxter Rice, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of March, 1983, I served three copies of Petitioner's Reply Brief on the Merits in support of Writ of Certiorari were mailed, postage prepaid, in an envelope addressed to each attorney of record, as follows:

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It is further certified that all parties required to be served have been served in accordance with Supreme Court Rule 28.

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Office-Supreme Court, U.S.
FILED
JAN 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-401

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

EVA REHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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This brief is submitted with the accompanying written consent of both parties.

The Agua Caliente Band of Cahuilla Indians, by its undersigned counsel, files this brief *amicus curiae* in support of the position of the respondent on the merits. The

Agua Caliente Band respectfully urges the Court to affirm the judgment of the Court of Appeals, and to hold that Mrs. Rehner, as a member of the Pala Band of Mission Indians and a federally-licensed Indian trader, may sell liquor at her small general store on the Pala Indian Reservation according to California's standards, but without a license issued by the California Department of Alcoholic Beverage Control.

INTEREST OF *AMICUS CURIAE*

The Agua Caliente Band of Cahuilla Indians is a federally-recognized tribe of Indians. Its reservation consists of approximately 31, 346 acres, located in the vicinity of Palm Springs, California. Of this area, approximately 24,314 acres, or 77.57%, are held in trust by the United States for either the Band itself or members of the Band. Approximately 8,828 acres of the reservation, or 28.16%, are located within the City of Palm Springs. The remaining acreage is located in two adjacent cities and in the unincorporated portions of the County of Riverside.

The Agua Caliente Indian Reservation was created by the Executive Orders of Presidents Grant and Hayes of May 15, 1876 and September 29, 1877, respectively, and was patented by the United States by patent no. 168071 to the Band on January 5, 1911, pursuant to the Mission Indian Relief Act of January 12, 1891. The patent declares that the United States "does and will hold the said tracts of land ... for the sole use and benefit of the said Agua Caliente Band or Village of Indians ...".

Soon after the Act of August 15, 1953 (18 U.S.C. §1161, 67 Stat. 586) was passed, the Agua Caliente Band enacted its initial liquor control ordinance on September 24, 1953. That ordinance merely authorizes liquor traffic on the Agua Caliente Indian Reservation if "in conformity with the laws of California." When the opinion of the Court of Appeals in *Rehner v. Rice* became known, the Tribal Council of the Agua Caliente Band, on December 21, 1982, enacted a new Tribal Liquor Control Ordinance, which became effective

on January 7, 1983, the date of its approval by the authorized representative of the Secretary of the Interior and publication on p. 874 of volume 48, no. 5 of the Federal Register. A copy of that ordinance appears as Appendix A.

Under ordinary circumstances, the Agua Caliente Band would view the present litigation with the same interest as do many other Indian tribes, but would probably not seek to make its views known by presenting them as it does now. However, the Agua Caliente Band's interest in the present litigation differs from that of other Indian tribes in that it appears that the California Department of Alcoholic Beverage Control (hereinafter, the "ABC") believes that the Agua Caliente Band poses so much of a threat to the orderly and uniform regulation of liquor traffic on the Agua Caliente Indian Reservation that review of the Court of Appeals' opinion in this Court is justified. As the ABC stated in its petition for a writ of certiorari:

> There is nothing in the Ninth Circuit opinion which limits sales by Indians on reservations to non-Indians nor does the opinion give any consideration to the matter of non-Indian licensees conducting their business on Indian reservations.
>
> In a heavily populated state like California, Indian tribes are not necessarily located in isolated areas. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one-half of the entire city, with the Indian lands interspersed among non-Indian lands in a checkerboard pattern. *Agua Caliente Band of Mission Indians v. County of Riverside* 442 F.2d 1184, 1185 (9th Cir. 1971). Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet on Indian land will be non-Indian. Yet on the basis of the Ninth Circuit ruling, it can now be argued that California is prevented from exercising any control over the number and location of these businesses, and the manner in which these businesses are conducted.
>
> Petition for Certiorari, pp. 16-18.

If the Agua Caliente Band were irresponsible and interested only in exploiting the opportunity provided by the Court of Appeals to its purely economic advantage, there might be some grounds for the ABC's fears. However, the Agua Caliente Band, acting through its Tribal Council, is a

responsible unit of local government. It is sensitive to the needs of the entire Palm Springs community, both Indian and non-Indian, and is interested rather in an orderly and carefully drawn regulatory plan for its reservation. To this end, the Band has enacted the above ordinance which places restrictions on the number, location, and identity of its liquor licensees identical to or even more restrictive than those administered by the ABC.

In order to bring the existence of this ordinance, and its particular features, to the Court's attention, the Agua Caliente Band now submits this brief. By doing so the Band seeks to demonstrate that the ABC's fears are groundless and that, on the contrary, the Agua Caliente Band is just as interested in and capable of providing a reasonable and workable system of control of liquor transactions for the Agua Caliente Indian Reservation as is the ABC. As the argument below demonstrates, the Agua Caliente Band has cooperated effectively for over five years with the local non-Indian government regarding the sensitive issue of land use on the reservation, and is equally willing to do the same with the ABC, on the basis of the Band's Tribal Liquor Control Ordinance. Indian tribes in general, and the Agua Caliente Band in particular, do not pose the parade of horrors feared by the ABC. If given the chance, the Agua Caliente Band will use its ordinance as the basis on which to erect a cooperative liquor control system for the Agua Caliente Indian Reservation, one in which the ABC's goal of uniformity of standards is achieved voluntarily on and off the reservation, while preserving the ultimate tribal responsibility envisioned by 18 U.S.C. §1161.

STATEMENT OF THE CASE

The Agua Caliente Band adopts the statement of the case contained in the brief on the merits submitted by Mrs. Rehner.

ARGUMENT

At pp. 80-81 of its opening brief, the ABC points to the Agua Caliente Indian Reservation specifically as the reservation in California where it believes the supposed difficulties flowing from the Court of Appeals' opinion will be most acute.

> Although an Indian retailer may operate his establishment in Indian Country, the effect of the transaction may well be felt outside the country. In a heavily populated state like California, Indian tribes are not necessarily located in isolated [places]. For example, the Agua Caliente Band of Mission Indians and its members control more than 26,000 acres of the Palm Springs area, nearly one half of the entire city, with the Indian lands interest first [interspersed] among non-Indian lands in a checkboard pattern. *Agua Caliente Band of Mission Indians v. County of Riverside* (9th Cir. 1971) 442 F.2d 1184, 1185. Given the size of the population of Palm Springs and the tourists it draws, a substantial proportion of the customers of a retail liquor outlet in Indian country will be non-Indian. There is absolutely no reason why state licensing laws should be applied on one side of the street in Palm Springs and not be allowed to apply on the other side simply because the latter is Indian country. [words in brackets added to make sense of original text]

To show that these fears are entirely unfounded, the Agua Caliente Band wishes to bring the following points to the Court's attention.

I.

THE AGUA CALIENTE BAND HAS ALREADY TAKEN STEPS TO ASSURE THAT LIQUOR TRAFFIC ON ITS RESERVATION WILL HAVE NO HARMFUL EFFECTS, EITHER ON THE RESERVATION OR OFF THE RESERVATION.

As stated in the above Presidential Executive Orders and federal trust patent establishing the Agua Caliente Indian Reservation, the reservation consists primarily of all of the even-numbered sections of land in three

townships, producing a checkerboard effect. Even though the reservation thus consists of alternating 640-acre blocks of reservation and non-reservation land, the Tribal Council is acutely aware of the need for minimizing any friction or discontinuity in essential municipal services occasioned by the transition from reservation to non-reservation status along the reservation's boundary lines, some of which are major streets.

A primary example of the Tribal Council's efforts to voluntarily take the steps necessary to promote a smoothly-running community, in which frequent transitions from reservation to non-reservation square miles of land will make no practical difference to the local non-Indian community, is in the field of land use planning and control. This is a field in which abrupt transitions from Tribal control[1] to City control, particularly from one side of a street to the other, could be particularly disruptive. To understand how the Agua Caliente Band has acted to eliminate such off-reservation effects of unfettered Tribal control of reservation land use requires the following brief background.

Prompted by certain litigation over the question of City control of reservation land use, the Secretary of the Interior, acting under 25 C.F.R. §1.4(b), promulgated an order, published at 30 F.R. 8172 on June 25, 1965, to the effect that, with certain relatively minor exceptions, the City of Palm Springs' land use controls would apply to the lands of the Agua Caliente Indian Reservation. However, the Secretary rescinded this order by another order published at 42 F.R. 32851 on June 28, 1977. In response, the City immediately ceased taking any actions affecting land use of reservation lands. At this point, the Agua

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1. The Court of Appeals has concluded that local governments may not exercise land use controls over reservation lands, while tribes may do so, in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir., 1975); *cert. denied* 429 U.S. 1038 (1977), which this Court cited with apparent approval in *Bryan v. Itasca County*, 426 U.S. 373, 388, n. 14 (1976).

Caliente Band could have simply exercised its own authority to control reservation land use, without reference to existing uses or plans for the interspersed non-reservation parcels, thus causing precisely the kind of harmful off-reservation effect that he ABC now fears.

However, the Agua Caliente Band did not do so. Instead, it recognized its obligation as a responsible unit of local government to achieve a uniform system of land use and planning throughout the City, while preserving ultimate Tribal authority over decisions regarding reservation lands. Within less than one month from the Secretary's rescinding order, the Agua Caliente Band and the City of Palm Springs voluntarily entered into a contract, a copy of which appears as Exhibit B, by which (1) the Band adopted all of the City's land use controls as the Band's own, (2) the Band designated the City as the Band's agent for the enforcement of those land use controls on reservation lands located within the City, (3) the parties agreed that those dissatisfied with any final action of the City regarding reservation land use could appeal to the Tribal Council, whose decision to affirm, modify, or reverse the City would be final, and (4) either party could cancel the contract on 30 days notice.

By this arrangement, which has been in effect for over five years without abrogation by either party, the Band and the City have achieved a coordinated and unified system of land use control for the entire community. The City administers the same land use controls for all lands within the City, acting under its own authority for non-reservation parcels and as agent of the Band for reservation parcels. In either case, the result of uniform and well-coordinated land use throughout the City is achieved with proper deference to the authority of each local government.

The Agua Caliente Band views the subject of liquor control similarly. It definitely does not wish to exploit the Court of Appeals' opinion to create regulatory chaos and an uncontrolled situation where liquor outlets could proliferate or be located at any location or be operated by

unsuitable persons, as the ABC fears. The Band's ultimate goal is to enter into a cooperative agreement with the ABC, much like the present agreement regarding land use with the City of Palm Springs, by which the ABC would perform the necessary screening, investigatory, and enforcement functions, with final actions subject to an appropriate degree of ultimate Tribal control. The purpose of such an arrangement would be to produce a system by which all those desiring to engage in any form of liquor traffic on the Agua Caliente Indian Reservation would deal directly with the ABC, which would perform all its usual functions, so that there would be no practical difference if such persons were locating their liquor activities on the reservation or off the reservation.

Soon after the Court of Appeals rendered its opinion in *Rehner v. Rice* on June 8, 1982, the Agua Caliente Band took steps to see if the ABC was interested in such an arrangement. The Band invited Mr. Rice himself to attend a meeting with the Band's Tribal Council at which such possibilities could be discussed. This meeting did occur on July 7, 1982. However, Mr. Rice apparently was not sufficiently convinced of the Band's motives or sincerity, since he has not pursued the matter since this meeting.

Still, the Band does not interpret this rebuff from Mr. Rice as an invitation for the Band to embark on a program of unlimited new liquor outlets or tribal licenses being issued to undesirable persons at unsuitable locations. Instead, even without the cooperation of the ABC, the Band desires to install a liquor control system on the Agua Caliente Indian Reservation with standards for these above particularly sensitive points being identical to the ABC's, or even more restrictive, with an existing Tribal body, the Indian Planning Commission and other Tribal staff, performing most of the functions that the Band would prefer to delegate to the ABC by contract.

To this end, on December 21, 1982 the Band's Tribal Council did enact a Tribal Liquor Control Ordinance. As

required by 18 U.S.C. §1161, the authorized representative of the Secretary of the Interior certified it and published it in volume 48, no. 5, page 874 of the Federal Register on January 7, 1983. A copy of the published ordinance appears as Exhibit A.

An examination of the Agua Caliente Band's Tribal Liquor Control Ordinance will reveal that the undesirable off-reservation effects of Tribal control of reservation liquor traffic are eliminated by the ordinance. Under this ordinance, all transactions must comply with the ABC's standards (§5). All present holders of ABC-issued licenses are afforded 5 years in which to dispose of those ABC-issued licenses and obtain equivalent Tribally-issued licenses (§6). The number of new licenses to be available each year will be no greater that that historically issued by the ABC for the same area (§7.1). As for the identity of new licensees and the location of new liquor outlets, the Band will use standards identical to those now employed by the ABC, but the Band may employ even more restrictive standards (§7.2). Other points are handled in the same spirit.

With all these common-sense restrictions in place, there should be no off-reservation effect at all of Tribal control of liquor traffic on the Agua Caliente Indian Reservation. While the Agua Caliente Band cannot guarantee that every Indian Tribe in California will behave similarly, the Agua Caliente Band has now set the model for voluntary and responsible self-restraint in this area, and it hopes that the other tribes will take similar steps. It is hard to imagine what further steps this Tribe, or any Tribe, could take to use its authority under the Court of Appeals' opinion more responsibly for the welfare of the entire community, both on the reservation and off the reservation.

II.

THE AGUA CALIENTE BAND STILL STANDS READY TO ENTER INTO A FORMAL ARRANGEMENT WITH THE ABC BY WHICH THE BAND WOULD DELEGATE MOST OF ITS LIQUOR CONTROL FUNCTIONS TO THE ABC.

Even though Mr. Rice was apparently not impressed by the Agua Caliente Band's initial efforts to negotiate a liquor control agreement similar to the above land use agreement, the Agua Caliente Band is ready and willing to do so at any time the ABC is interested. The Band constructed its Tribal Liquor Control Ordinance with this possibility in mind and made specific provision in that ordinance for doing so:

> During this transition period, the Tribal Council will actively solicit the assistance and support of the California Department of Alcoholic Beverage Control in implementing and, if necessary, amending this ordinance to produce a regulatory scheme for liquor on the Agua Caliente Indian Reservation which will resemble that already in place and operating under the authority of the said Department to the extent feasible, so that the only essential difference between the two schemes will be that the source of licenses will be the Agua Caliente Band, rather than the said department, with issues regarding the number of new licenses, the location of new outlets, the identity of new licensees, the transferability of present and new licenses, the method and conditions of conducting transactions, etc. to be resolved cooperatively so as to produce a tribal regulatory scheme which not only resembles that of the state, as noted above, but is also coordinated with and integrated with that of the Department. One goal of such cooperation will be to eliminate the possibility that any licensee, present or future, will be able to exploit the transition from state to tribal licensing and control to his financial, competitive, or regulatory advantage. To this end, the Tribal Council will seek to enter into a contractual or similar relationship with the said Department by which the Tribal Council would designate the said Department as the Tribal Council's agent for administration of this ordinance, with ultimate control in the Tribal Council, as assisted and supported by the said Department and its staff.
>
> Tribal Liquor Control Ordinance, §6

> 4. *Coordination with interested parties.* In all decisions regarding licensing, the Tribal Council will solicit and give due weight to the views and recommendations of interested local non-Indian governments, the Bureau of Indian Affairs, the California Department of Alcoholic Beverage Control, local and federal law enforcement, and others with a special interest or expertise in the subject. To the extent deemed useful by the Tribal Council, public hearings will be held by either the Tribal Council or the Indian Planning Commission.
> *Id.*, §7.4
>
> *Section 10. Coordination with California Department of Alcoholic Beverage Control*
> The Tribal Council recognizes the experience and expertise of the California Department of Alcoholic Beverage Control in matters regarding liquor transactions. To the extent that that Department is willing to cooperate with the Tribe, the Tribal Council will take all appropriate steps to coordinate its liquor control program and its actions under this Ordinance with the Department, including delegating certain staff and investigative functions to the Department by contract.
> *Id.*, §10

Even if the ABC is not interested in cooperating with the Agua Caliente Band, the Band has extended a standing invitation to the ABC for such cooperation. It is now up to the ABC to accept the offer.

CONCLUSION

It is indeed ironic that the ABC finds it necessary to seek review in this Court of the Court of Appeals' opinion holding that Indian tribes have sole authority to regulate liquor traffic on their reservations. Alcohol abuse is the single largest health problem with Indians across the country. It has devastated the Indian family, has robbed Indians of employment, has diverted limited tribal and individual resources, and has caused untold anguish for Indians and non-Indians alike for centuries in Indian country. The Agua Caliente Band and its members have not escaped the ravages of alcohol.

And yet the ABC does not trust the Indian people, or the Agua Caliente Band, to behave responsibly on this subject. For the reasons noted above, the Agua Caliente Band submits that it has a proven record of voluntary self-control and genuine community spirit, both regarding land use and also liquor. Even without the ABC's cooperation the Agua Caliente Band has acted to regulate reservation liquor traffic almost identically to the way the ABC would regulate it, despite the opportunities for exploitation. This will produce a satisfactory result on this reservation, a result which will have no off-reservation effect, but which could be improved by the ABC's cooperation.

For the above reasons, the Agua Caliente Band urges the Court to dismiss the ABC's unfounded fears, and to affirm the judgment of the Court of Appeals.

Dated: January 24, 1983

Respectfully submitted,

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Counsel for Amicus Curiae,
The Agua Caliente Band
of Cahuilla Indians

APPENDIX A

AGUA CALIENTE BAND OF CAHUILLA INDIANS TRIBAL LIQUOR CONTROL ORDINANCE

Section 1. Title

This Ordinance shall be known and referred to as the Agua Caliente Liquor Control Ordinance.

Section 2. Applicability

This Ordinance shall apply to all transactions, as noted below, occurring on the lands of the Agua Caliente Indian Reservation, which are now or may in the future be held in trust by the United States for either the Agua Caliente Band or any individual Indian(s). The Agua Caliente Indian Reservation, as used herein, includes all lands included in the Executive Orders of President Grant of May 15, 1876 and of President Hayes of September 29, 1877, and as patented to the Band by patent no. 168071 issued by President Taft on January 5, 1911 under the authority of the Mission Indian Relief Act of January 12, 1891, plus any additional lands which may be added to the Agua Caliente Indian Reservation in the future.

Section 3. Findings and Purpose

1. The introduction, possession and sale of liquor on Indian reservations have always been clearly recognized as matters of special concern to Indian Tribes and to the United States. The control of liquor on reservations remains exclusively subject to their legislative enactments.

2. Ever since at least 1953, when the Agua Caliente Band enacted its first ordinance on the subject of the application of the federal Indian liquor laws on the Agua Caliente Indian Reservation and the Secretary of the Interior approved that ordinance, the federal government has respected this Tribe's determinations regarding liquor-related transactions and activities on the Agua Caliente Indian Reservation. Federal law currently prohibits the introduction of liquor into Indian Country (18 U.S.C. §1161).

3. Present day circumstances make a complete ban of liquor within the Agua Caliente Indian Reservation ineffective and unrealistic. At the same time, a need exists for strict tribal regulation and control over liquor distribution.

4. The enactment of a tribal ordinance governing liquor sales on the Reservation providing for reasonable restrictions on liquor transactions occurring on the Agua Caliente Indian Reservation will increase the ability of the tribal government to control Reservation liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation of the tribal government and delivery of governmental services.

5. In order to provide for increased tribal control over liquor distribution and possession on the Reservation and to provide for urgently needed additional revenue, the Tribal Council adopts this liquor ordinance.

6. This ordinance is intended to replace, repeal, and supersede the Tribe's previous Ordinance, adopted on September 24, 1953, on the same subject, and this ordinance will do so and become fully effective on the date when it is certified by the Secretary of the Interior, or his authorized representative, and is also published in the Federal Register.

7. Nothing in this ordinance will operate or be construed to limit or restrict the terms of any existing lease of trust land or to impair the ability of the Bureau of Indian Affairs to discharge its duties regarding such leases.

Section 4. Definitions

Unless otherwise required by the context, the following words and phrases shall have the designated meanings:

2. **Sale and Sell** includes exchange, barter, and traffic, and also the selling or supplying or distribution by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person; and also includes a sale or selling within the state to a foreign consignee or his/her agent in the state.

2. **Wholesale Price** shall mean the established price for which liquor, beer and wine products are sold to the Agua Caliente Band of Cahuilla Indians or any licensed operator by the manufacturer or distributor, exclusive of any discount or other reduction.

3. **Alcohol** is that substance known as ethyl alcohol, hydrated oxide or ethyl, or spirit of wine, which is commonly produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions and mixtures of those substances.

4. **Liquor or Liquor Products** includes the four varieties of liquor herein defined (alcohol, spirits, wine and beer) and all fermented, spirituous, vinous or malt liquor, or combinations thereof, and mixed liquor, a part of which is fermented, spirituous, vinous or malt liquor or otherwise intoxicating and every liquid or solid or semisolid or other substance patented or not containing alcohol, spirits, wine or beer and all drinks of drinkable liquids and all preparations or mixtures capable of human consumption, and any liquid, semisolid, solid, or other substance, which contains more than one percent of alcohol by weight shall be conclusively deemed to be intoxicating.

5. **Spirits** means any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen (17%) percent of alcohol by weight.

6. **Wine** means any alcoholic beverage obtained by fermentation of fruits, grapes, berries, apples, et cetera or other agricultural product containing sugar, to which any saccharine substances may have been added before, during or after fermentation, and containing not more than seventeen (17%) percent of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel and angelica, not exceeding seventeen (17%) percent of alcohol by weight.

7. **Liquor Outlet** means any retail or wholesale business licensed by the Tribe to engage in the on-premises or off-premises sale of liquor, beer, or wine.

8. **Tribe or Band** means the Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian tribe, acting through its duly elected and duly serving Tribal Council.

Section 5. Prohibitions

The introduction, purchase, sale, and dealing in liquor, other than through the licensees of the Tribe, within the Agua Caliente Indian Reservation, is hereby prohibited, except as provided herein.

Federal Indian liquor laws shall remain applicable to any act or transaction which is not authorized by this ordinance and violators of this ordinance shall be subject to federal prosecution as well as to legal action in accordance with applicable law.

Tribally authorized liquor transactions shall comply with California State Liquor law standards to the extent required by 18 U.S.C. §1161.

Section 6. Transition Period

All persons who, from the date that this Ordinance becomes effective and until five years thereafter, hold a valid license issued by the State of California Department of Alcoholic Beverage Control pursuant to California Business & Professions Code §23,000 et seq. may present to the Tribal Council evidence of his or her possession of such license. If the Tribal Council is satisfied that such person does have such a valid license, and if that person also satisfies the Tribal Council that he/she also holds a valid federal Indian trader's license issued pursuant to 25 U.S.C. §261-264 and 25 C.F.R. §251, then the Tribal Council will issue to such person a Tribal license equivalent in scope and duration to that person's previous state-issued license. Each such person shall pay a nominal fee to the Tribal Council for the privilege of the issuance of such an equivalent license in an amount equal to the Tribal Council's administrative expense in processing the request, which amount will be set by resolution of the Tribal Council. Each such Tribal licensee may retain his previously-issued state license or dispose of it as he or she wishes. Such Tribal licenses will be equally available to Indians and non-Indians, members of the Tribe and non-members. If a holder of such a previously-issued state license does not so obtain a Tribal license during the said five-year period,

then he or she will be deemed, at the expiration of that five-year period, to be in violation of this Ordinance.

During this transition period, the Tribal Council will actively solicit the assistance and support of the California Department of Alcoholic Beverage Control in implementing and, if necessary, amending this ordinance to produce a regulatory scheme for liquor on the Agua Caliente Indian Reservation which will resemble that already in place and operating under the authority of the said Department to the extent feasible, so that the only essential difference between the two schemes will be that the source of licenses will be the Agua Caliente Band, rather than the said department, with issues regarding the number of new licensees, the transferability of present and new licenses, the method and conditions of conducting transactions, etc. to be resolved cooperatively so as to produce a tribal regulatory scheme which not only resembles that of the state, as noted above, but is also coordinated with and integrated with that of the Department. One goal of such cooperation will be to eliminate the possibility that any licensee, present or future, will be able to exploit the transition from state to tribal licensing and control to his financial, competitive, or regulatory advantage. To this end, the Tribal Council will seek to enter into a contractual or similar relationship with the said Department by which the Tribal Council would designate the said Department as the Tribal Council's agent for administration of this ordinance, with ultimate control in the Tribal Council, as assisted and supported by the said Department and its staff.

Section 7. Issuance of New Licenses

Subject to the limitations described below, the Tribal Council may issue new licenses, according to procedures and on application forms to be prescribed by resolution of the Tribal Council, for the sale, distribution, and other aspects of liquor transactions according to the categories of such licenses now described by California Business & Professions Code §23,000 et seq. In considering all such applications for new licenses, the Tribal Council will take into account the following factors:

1. **Number of new licenses.** Either by its own research or in cooperation with the California Department of Alcoholic Beverage Control, the Tribal Council shall determine the number of each kind of new license which the said department has historically issued annually for businesses or operations located on the trust lands subject to this ordinance, and will issue no greater number of each such kind of license annually than that historic number.

2. **Identity and location of new licensees.** In selecting which applicants for new licenses will be granted such new licenses, the Tribal Council will employ standards and take into account the same considerations as the California Department of Alcoholic Beverage Control employs, pursuant to California Business & Professions Code §23,000 et seq., for each kind of new license. However, if the Tribal Council deems it desirable to protect the public health, safety, or welfare, it may employ standards or criteria more restrictive than those employed by the California Department of Alcoholic Beverage Control. In no event will the Tribal Council employ less restrictive standards or criteria. In addition, all applicants must present evidence that they hold federal Indian trader's licenses issued pursuant to 25 U.S.C. §§261-4 and 25 C.F.R. §251.

3. **Allocation of new licenses.** If the number of qualified applicants for a kind of license for any year exceeds the number of new licenses of that kind to be issued for that year, the Tribal Council may refer the question of the selection of which applicants will be issued new licenses to the Indian Planning Commission for its recommendation as to which applications, if granted, would be most consistent with principles of sound planning and the public health, safety, and welfare. The Indian Planning Commission's recommendation may be in the form of a ranking of qualified applicants or the results of a lottery conducted according to procedures to be established by resolution of the Tribal Council. In no event will a new or substitute license be issued if such issuance would result in a use of land which violates or is inconsistent with land use regulations established by the Tribal Council, either by contract

with a local non-Indian government or directly by the Tribal Council.

4. **Coordination with interested parties.** In all decisions regarding licensing, the Tribal Council will solicit and give due weight to the views and recommendations of interested local non-local governments, the Bureau of Indian Affairs, the California Department of Alcoholic Beverage Control, local and federal law enforcement, and others with a special interest or expertise in the subject. To the extent deemed useful by the Tribal Council, public hearings will be held by either the Tribal Council or the Indian Planning Commission.

5. **Fees.** In order to maintain the stability of the market in licenses, the Tribal Council may charge a fee for the issuance of a license comparable to that charged in free-market sales of particular kinds of licenses. The amount of the fee to be charged for each kind of license will be determined by resolution of the Tribal Council and will not disrupt the market.

Section 8. Transfers of licenses

Each license issued by the Tribal Council will be freely transferable from person to person and from premises to premises on the following conditions.

1. The application for a transfer must be approved in advance by the Tribal Council and must be accompanied by a non-refundable fee sufficient to defray the administrative expense of processing the application. The amount of the fee will be set by resolution.

2. Transfers of existing Tribal licenses to new persons will be on applications similar to those for new licenses. The Tribal Council and/or the Indian Planning Commission will review such applications under the same criteria and standards as it uses for selecting qualified new licensees.

3. Transfers of existing licenses to new premises will be on application referred to the Indian Planning Commission for its views regarding the suitability of the new premises. In reviewing such applications, the Indian Planning Commission will evaluate the new premises according to the same standards and criteria as it uses for new licenses.

Section 9. Renewals, Suspensions, and Revocations

All licenses shall be issued for a period of one year and shall be automatically renewable on application to the Tribal Council when accompanied by a fee to be set by resolution of the Tribal Council to defray the Tribal Council's expenses in processing an application, the amount of which will be set by resolution of the Tribal Council.

However, a license will not be automatically renewed if any person has raised a serious question as to the violation by the licensee of any California state law standard regarding liquor transactions, or any other matter regarding the suitability of the licensee or licensed premises for a renewal. In such case, the Tribal Council will take such steps as are necessary to investigate, evaluate, and verify the charges, according to procedures to be established by resolution of the Tribal Council, and may impose such conditions, or deny the application for renewal, as the findings may justify.

For charges of serious violations of state standards of behavior or suitability of the licensee or premises occurring during the term of a license, the Tribal Council will take steps similar to those noted above and, as its findings warrant, may suspend or revoke a license on adequate notice and hearing. In all such proceedings, the Tribal Council will solicit the views and assistance of the California Department of Alcoholic Beverage Control, local law enforcement officials, and others with reliable information in order for its decision to be fair to the licensee while still protecting the public health, safety, and welfare.

Section 10. Coordination with California Department of Alcoholic Beverage Control

The Tribal Council recognizes the experience and expertise of the California Department of Alcoholic Beverage Control in matters regarding liquor transactions. To the extent that Department is willing to cooperate with the Tribe, the Tribal Council will take all appropriate steps to coordinate its liquor control program and its actions under this Ordinance with the Department, including delegating

certain staff and investigative functions to the Department by contract.

Section 11. Tribal liquor enterprise

In addition to issuing licenses of various kinds to private parties under this Ordinance, the Tribal Council may, by amendment of this ordinance, establish a Tribal liquor enterprise on such terms and conditions as may be appropriate.

Section 12. Taxes

The Tribal Council may, by ordinance or resolution, levy taxes (excise and otherwise) on the retail and/or wholesale sale of liquor, beer, or wine by licensees under this Ordinance. All such taxes shall be on the buyer, shall be paid by the buyer, shall be collected by the seller, and shall be remitted by the seller to the Tribal Council. All such taxes shall be devoted to the following purposes:

a. Strengthening Tribal government, which shall include but not be limited to, strengthening the tribal justice system enforcing this ordinance.

b. Health, education, and other social service programs.

c. Alcohol and drug abuse community services.

d. Preserving and increasing the Tribal trust land base.

Section 13. Sovereign immunity preserved

Nothing in this ordinance is intended or shall be construed as a waiver of the sovereign immunity of the Tribe. No agent, officer, or employee of the Tribe shall be authorized, nor attempt, to waive the immunity of the Tribe.

Section 14. Penalty

Any person, whether licensee or not, who violates this ordinance, or any part of it, will be deemed to have violated 18 U.S.C. §1161, and will be referred to the appropriate authorities for prosecution.

Section 15. Authority for adoption of Ordinance

This Ordinance is adopted and applied pursuant to Article V, parts (a), (b), (i), (k), and (l) of the Constitution of the Agua Caliente Band of Cahuilla Indians, as amended, approved by the Commissioner of Indian Affairs on April 18, 1957.

CERTIFICATION

The foregoing ordinance was duly adopted and enacted by a vote of 4-0 in favor, -0- opposed, and -0- not voting at a duly called and noticed regular meeting of the Tribal Council of the Agua Caliente Band of Cahuilla Indians at which a quorum was present on the 21st day of December, 1982 at the offices of the Tribal Council at Palm Springs, California.

Barbara Gonzales, Chairman

Moraino Patencio, Vice-Chairman

Richard Milanovich, Secretary

Belinda Sue Short, Member

Gloria W. Gillette, Proxy Member

APPENDIX B

CONTRACT

This agreement is made as of the 26th day of July, 1977, by and between the Tribal Council of the Agua Caliente Band of Cahuilla Indians ("Tribal Council") and the City Council of the City of Palm Springs, California ("City").

I. Statement of Facts

1. The Tribal Council is the legally recognized organized governing body of the Tribe with the authority under its Constitution and By-Laws to enter into this agreement with the City.

2. The Under Secretary of the Interior, effective as of June 28, 1977, issued a Notice (42 F.R. 32851) rescinding the application of the land use regulatory laws of the City of Palm Springs and the State of California to those leased Indian trust lands geographically located within the City.

3. The Tribal Council has the power under its Constitution and By-Laws and in keeping with its powers of self-determination to adopt policies to achieve the highest and best use of Agua Caliente Indian lands, including but not limited to zoning and development thereof.

4. In view of the Under Secretary's Notice, the City, by City Council Resolution No. 12249 adopted on June 29, 1977, has suspended the processing of applications filed on and after June 29, 1977, dealing with Indian trust lands.

5. The suspension of applications in respect to the development of Indian trust land, if not promptly and properly eliminated threatens to impose an unreasonable hardship on the appropriate development of Indian trust land and to irreparably damage the economy of the entire community.

6. Both parties recognize the need for effective planning, zoning, and land use controls with respect to all lands under their respective jurisdiction.

7. The parties desire to make a sincere effort to effectively resolve this problem without delays and in a mutually satisfactory manner.

II. Agreement to the Parties

In consideration of the mutual promises and undertakings hereinafter agreed to, the Tribal Council and the City do hereby agree as follows:

1. Upon execution of this agreement, the Tribal Council shall by ordinance or resolution make applicable to Indian trust lands geographically located within the City the laws, ordinances, codes, resolutions, rules, or other regulations of the State of California and of the City, limiting, zoning or otherwise governing, regulating or controlling the use or development of Indian trust lands within the geographical limits of the City, and the City will resume the processing and, when all is found to be regular and in accordance with applicable laws and regulations, the issuance of all permits pertaining to said Indian trust lands in all ways necessary and proper for the development thereof, which shall include but not be limited to the following:

a. Building and utility permits,
b. Changes of zone,
c. Variances from applicable zoning requirements,
d. Conditional use permits,
e. Planned Development District permits,
f. Tentative and final Tract and Parcel Maps,
g. Changes of amendments to the General Plan,
h. Enforcement of zoning and building codes,
i. Compliance with State and Federal environmental regulations, and
j. Related matters to the above.

2. As further consideration the City of Palm Springs may collect all fees heretofore collected or as the same may be amended and reasonably related to the cost of administering paragraph 1 above.

3. The Tribal Council and the City shall consult with each other regarding all planning and zoning matters affecting Indian trust lands.

4. Any party aggrieved by an action of said City Council in planning and zoning matters as outlined in paragraph 1.a. through 1.j. above, affecting Indian trust lands may appeal to the Tribal Council for relief. Said Tribal Council in accordance with procedures to be established, after notice and opportunity for hearing and on the basis of the entire record, may affirm, reverse or modify any decision of said City Council on a matter affecting Indian trust lands and the decision of the Tribal Council shall be final. In no event shall the Tribal Council act finally on an appeal before meeting jointly with the City Council to review said appeal.

5. This agreement is intended to serve pending the development of future procedures, rules or regulations by agreement of the parties respecting regulation of land use on Indian trust lands geographically located within the City. Joint discussions regarding these matters shall begin not more than 120 days after approval of this agreement. However, either party may terminate this agreement, without prejudice to any legal position thereafter asserted except as hereafter provided, upon thirty (30) days written notice to the other party. In the event of termination of this agreement, any project existing or in process pursuant to previously granted approval by the City shall continue to be bound by the terms and conditions of such approval.

6. This agreement shall be approved by resolutions of the Tribal Council and the City Council.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their respective authorized officers the day and year first above written.

TRIBAL COUNCIL OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS

By s/Ray Leonard Patencio

CITY OF PALM SPRINGS, CALIFORNIA

By s/Russell J. Beirich, *Mayor*

Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-401

In the Supreme Court of the United States

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY, AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

vs.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE MESCALERO APACHE TRIBE IN SUPPORT OF RESPONDENT EVA REHNER

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QUESTION PRESENTED

Does 18 U.S.C. Section 1161 or the Twenty-first Amendment to the United States Constitution confer jurisdiction on the State of California to require a tribal member to obtain a state license for the sale of alcoholic beverages on an Indian reservation?

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NO. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, Individually, and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE MESCALERO APACHE TRIBE IN SUPPORT OF EVA REHNER

SUMMARY OF ARGUMENT

The State of California has argued that 18 U.S.C. 1161 or the Twenty-first Amendment to the United States Constitution explicitly authorizes state regulatory jurisdiction over sales of alcoholic beverages by tribal members on Indian reservations. Neither of these federal provisions contain such authorization. A construction of 18 U.S.C. 1161 which would require state licenses for such activity would frustrate both the anti-discriminatory intent of the statute and federal policy favoring tribal self-determination, and would be contrary to established principles of federal Indian law.

For these reasons, the Mescalero Apache Tribe respectfully submits that the Court should affirm the decision of the Ninth Circuit and deny the State of California authority to require licenses for the sale and distribution of alocholic beverages in Indian country.

INTEREST OF AMICUS CURIAE

This brief is filed with the written consent of all parties.

The Mescalero Apache Tribe is a federally-recognized Indian tribe in the

State of New Mexico. The Mescalero Indian Reservation was first established by a Presidential Executive Order in 1873. The Mescalero Apache Tribe [hereinafter "Tribe"] has a constitutional government organized pursuant to 25 U.S.C. Section 476, and exercises full powers of self-government, subject only to the control surrendered to the United States as trustee.

The Tribe exercised the option granted it by 18 U.S.C. Section 1161 to permit and regulate the licensing, sale and distribution of alcoholic beverages within the Mescalero Apache Reservation, through the adoption of an ordinance published in 30 Fed. Reg. 3553 (March 17, 1965). For a period of ten years thereafter the Tribe owned and operated a tribal bar on the Reservation without a state license, in accordance with a written opinion by the Chief of the New Mexico Division of Liquor Control that an Indian tribe could establish its own liquor operation on reservation land without a state license.

In 1975, with the approval and assistance of the federal government, the Tribe opened a multi-million dollar

resort, the Inn of the Mountain Gods, to be operated for the benefit of the tribal education, social and economic welfare programs on behalf of tribal members. As an integral and essential part of this enterprise, the Tribe began to sell alcoholic beverages at the Inn.

The State of New Mexico then reversed its earlier position and informed the Tribe that a state license would be required for operation of the tribal bar at the Inn of the Mountain Gods. Because of the state "quota" system in effect at that time, and because of state regulations regarding the location and number of licensed outlets, acquisition of a state license for the tribal bar was impossible. The United States, in its own interest and on behalf of the Tribe, brought suit in Federal District Court for a declaratory judgment that the Tribe had sole authority to regulate the licensing of tribal outlets located within the exterior boundaries of the Reservation and for appropriate injunctive relief.

The District Court of the United States for the District of New Mexico granted the relief requested by the United

States. Copies of the Judgment, Findings of Fact and Conclusions of Law of the District Court are submitted as an Appendix to this brief. The State of New Mexico appealed the decision to the Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the judgment of the trial court. United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979).

The Mescalero Apache Tribe currently operates two tribal liquor outlets, which are regulated solely by tribal and federal authorities. Contrary to the conjectures of the states, the system functions very smoothly in actual practice. As required by 18 U.S.C. Section 1161, the tribally-operated liquor outlets are operated in conformity with all state substantive laws, such as hours of operation and age restrictions. Enforcement of these standards is achieved through tribal and federal action. There has been no increase in "lawlessness", and the Tribe has achieved a measure of control over alcohol-related problems on the Reservation. Liquor laws are enforced by tribal staff and by federal law

officers.

If these outlets could not be operated, the tourism industry on the Reservation would be gravely affected. The multi-million dollar investment in the Inn of the Mountain Gods could be rendered virtually worthless. The imposition of state licensing requirements on tribal enterprises would have a significant adverse effect on the Tribe's economic development and would undermine tribal self-determination. A decision adverse to Mrs. Rehner, by limiting tribal liquor sales, would negate the anti-discriminatory purpose of 18 U.S.C. Section 1161 and would deprive Indian tribes of a degree of control over alcohol-related social problems on the Reservation.

ARGUMENT

Under well-established principles of federal Indian law, state laws do not apply to Indians on Indian reservations unless Congress has expressly authorized state jurisdiction. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-71 (1973). In the absence of an express grant of state jurisdiction, courts have denied state licensing and

taxing power over Indians on reservations. Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976).

All statutes affecting Indian tribes must be construed in light of two long-standing canons of construction. The first requires that any ambiguity be resolved in favor of the Indians. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); DeCoteau v. District County Court, 420 U.S. 425, 444 (1975). Second, all statutes must be viewed against the underlying federal policy of leaving Indians free from state jurisdiction. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 168 (1973). In light of these general principles, it is clear that neither 18 U.S.C., Section 1161 nor the Twenty-first Amendment to the United States Constitution contain the requisite express grant of jurisdiction.

I. Section 1161 Is Not a Grant of Regulatory Jurisdiction to the States.

Prior to the enactment of 18 U.S.C. Section 1161, jurisdiction over Indian

liquor transactions was exercised exclusively by the federal government through a series of prohibitory laws. See generally, F. Cohen, Handbook of Federal Indian Law, 353 (1942). Until 1953, federal law generally prohibited any introduction, possession or sale of intoxicating liquor in Indian country.

In 1953, the passage of 18 U.S.C. Section 1161 altered the federal position on this subject. Section 1161 reads in full as follows:

> The provisions of Sections 1154, 1156, 3113, 3488 and 3618 of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country, certifed by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, a. 502, Section 2, 67 Stat 586.

As agreed by all parties, and as discussed at length in Petitioner's Brief on the Merits, pp. 31-46, the intent of this law was to eliminate discrimination against Indians and Indian tribes by allowing the sale of liquor on reservations. Both the House and Senate Committee Reports clearly indicate that

Congress intended to insure that Indians on reservations have access to liquor under the same terms as non-Indians off the reservation. House Report No. 775, 83d Cong., 1st Sess., p. 1, July 13, 1953; Senate Report No. 722, 83d Cong., 1st Sess., p. 1, July 29, 1953. Section 1161 insured this by giving Indian tribes the right to regulate the sale and usage of alcoholic beverages on their own reservation. In order to harmonize the interests of the states with the legitimate self-government interests of the Indian tribes, the statute requires that liquor sales on the reservation be "in conformity" with state laws. This purpose is clear from a letter from the Assistant Secretary of the Interior to the Director, Bureau of Budgets, dated August 7, 1953, which forms part of the legislative history of 18 U.S.C. Section 1161. The letter states:

> Thus, the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the state.

The Department of the Interior has continued to support the view that Section 1161 does not require that an Indian tribe obtain a state license for liquor

transactions on a reservation. Sol. Mem. M-36815, 78 I.D. 39 (February 3, 1971). In the case of the Mescalero Apache Tribe, the United States Department of Justice brought suit to enforce that view. United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978). These constructions of the statute by agencies responsible for executing the statute are entitled to "great respect", Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 48 L.Ed. 2d 274, 96 S.Ct. 1793 (1976), and such constructions should not be "overruled without cogent and persuasive reasons". La Roque v. United States, 239 U.S. 62 (1915); United States v. Jackson, 280 U.S. 183 (1930).

If Indian tribes are required to obtain state licenses for liquor transactions on the reservation, the anti-discriminatory purpose of Section 1611 could be completely frustrated. In the Mescalero case, the Tenth Circuit recognized that the cost of a state license under the quota system would impose a financial burden upon the Tribe. U.S. v. New Mexico, 590 F.2d 323, 325 (10th Cir. 1978). In addition, geographical and other restrictions on

licenses in effect at that time could have prevented the Tribe from obtaining a license for the Inn of the Mountain Gods at any cost. It is clear that, under the states' view of Section 1611, a state could effectively keep Indian reservations "dry", even where the state itself allows sales of alcoholic beverages. This could occur in any state, but particularly in states with a "quota" system or in so-called "monopoly" states. Thus, under Petitioner's view, the discriminatory prohibition against liquor sales on Indian reservations could be resurrected at a state's option. This would be directly in conflict with the opinion in U.S. v. Mazurie, 419 U.S. 544 (1975), in which the Supreme Court held that by the enactment of Section 1161:

> Congress delegated its authority to control the introduction of alcoholic beverages into Indian country...to entities which possess a certain degree of indpendent authority over matters that affect the internal and social relations of tribal life. (i.e., to tribes).

U.S. v. Mazurie, 419 U.S. at 557. If Section 1611 is construed to require state licenses for reservation liquor sales, that congressional delegation would be rendered virtually meaningless. As stated by the Court in Mazurie, liquor

transactions are "matters that affect the internal and social relations of tribal life". If states which allow liquor sales may effectively decide through licensing whether liquor may be sold on reservations, Indian tribes will be deprived of both their independent authority over internal matters and the authority delegated to them by Congress.

On the Mescalero Apache Reservation, as in most other communities in this country, liquor outlets function to some extent as community gathering places. It would frustrate the anti-discriminatory intent of Congress if, under Section 1611, states could effectively eliminate such tribal liquor outlets.

In recent years, federal policy has fostered Indian autonomy, reservation self-government and economic self-development. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975). On the Mescalero Apache Reservation, that policy has been fostered through tribal sales of liquor.

Prior to the opening of the Reservation to sales of liquor, tribal members who purchased liquor did so primarily at two off-reservation bars,

one located 19 miles from the Reservation. Obviously, under those circumstances, most alcohol-related offenses occurred off-reservation, were prosecuted under state jurisdiction, and were outside the control of the Tribe. Since approximately 1967 the Tribe has chosen to sell liquor on the Reservation through tribally-operated outlets. The Tribe has chosen to strictly regulate the sale of liquor in this manner, rather than to rely on state licensing of off-Reservation private enterprise.

The spectre of increased "lawlessness" raised by the states has not occurred on the Mescalero Apache Reservation. Sales of liquor adhere to state substantive standards, and liquor laws are enforced by tribal staff members. The federal government maintains ten law officer positions for the enforcement of federal law, including violations of substantive state standards.

Liquor sales on the Reservation have resulted in increased tribal control over alcohol-related social problems. Because it operates the liquor outlets, the Tribe has access to information regarding liquor consumption on the Reservation. The Tribe

is concerned with alcohol-related social problems, and has established a special tribal committee to investigate the problems and recommend solutions. Because most drinking occurs on the Reservation, offenders are processed through Tribal Court. The Tribal Court routinely refers offenders to the Tribal Alcoholism Treatment Program. This is a program operated with federal funds and with tribal support in the form of contributions of buildings, vehicles, furnishings, equipment and administrative services. The Tribal Court is in the process of establishing a school for members convicted of driving while intoxicated.

This vital tribal control over matters directly affecting tribal members could be vitiated by a scheme which allowed the State to curtail or eliminate liquor sales on the Reservation. Furthermore, the Tribe's economy is largely dependent on tourism, and would be devastated by elimination of liquor sales on the Reservation.

The interest in tribal self-control expressly protected by the language of Section 1611 would be damaged by state

entry on the Reservation to enforce its licensing requirements. Such an intrusive exercise of state jurisdiction, in a field totally preempted by federal and tribal regulation, could only be justified by an express congressional grant of jurisdiction. Bryan v. Itasca County, 426 U.S. 164 (1973). Section 1611 simply cannot be read to provide such a grant.

The State's interest in uniformity, on the other hand, is adequately protected by the requirement that state substantive laws be followed.

It is surely surprising that the State of California would argue that its citizens are somehow damaged or subject to discrimination through application of its own state laws. Petitioner's Brief on the Merits, pp. 31-37. Systems of law are generally considered to be enacted for the benefit and protection of citizens. If Indians are indeed placed in "a position superior to that of non-Indians", perhaps the State of California should consider a review of its own jurisprudence.

The State's arguments regarding the substantive/procedural distinction are without foundation. This argument was

also made in the Mescalero case and was rejected. The Tenth Circuit treated the issue as one concerning "regulatory powers in Indian Country or on Indian lands" and therefore requiring an express congressional grant for the state jurisdiction to exist. United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978). Whatever may be the rule in regard to other state laws, the requirement of a state license is clearly regulatory.

The view that Section 1611 merely incorporates state standards is consistent with the general scheme of law enforcement in Indian country, as established in federal law. Act of June 25, 1948, 62 Stat. 686, codified at 18 U.S.C. Section 13; Act of June 25, 1948, 62 Stat. 758, codified at 18 U.S.C. Section 1154.

II. The Twenty-first Amendment To The United States Constitution Does Not Authorize State Regulatory Jurisdiction Over Liquor Sales On Indian Reservations.

In the Mescalero case the State of New Mexico also raised the argument that the Twenty-first Amendment authorized the State to regulate liquor licensing

on Indian reservations. The Tenth Circuit summarily disposed of the argument. United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978). This was entirely appropriate in view of settled law on the issue. As stated by the Supreme Court in Collins v. Yosemite Park and C. Co., 304 U.S. 518, 82 L. Ed. 1502 (1938), in dealing with the same issue:

> The lower court was of the opinion that though the Amendment may have increased the State's power to deal with the problem..., it did not increase its jurisdiction. With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment.

The case of the United States v. Mississippi Tax Commission, 412 U.S. 363 (1973), 421 U.S. 599, 95 S.Ct. 1972 (1975), reaffirms the proposition that, while the Twenty-first Amendment may have given states greater authority over the subject matter of alcoholic beverages, it does not expand its territorial jurisdiction in any way.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals for the Ninth Circuit, which denied the State of

California the authority to require that a tribal member selling alcoholic beverages on a reservation obtain a state license, should be affirmed.

RESPECTFULLY SUBMITTED,

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APPENDIX

IN THE DISTRICT COURT
OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff

vs

STATE OF NEW MEXICO and
CARLOS L. JARAMILLO, Director
Department of Alcoholic
Beverage Control

Defendants

J U D G M E N T

The United States of America has requested this Court to render a declaratory judgment that the Mescalero Apache Tribe has sole authority to regulate the licensing of tribal outlets located within the exterior boundaries of the Mescalero Apache Reservation and to regulate the sale of alcoholic beverages by these outlets. The Court has also been requested to grant appropriate injunctive relief. The Court having considered the stipulated facts submitted by the parties, the court record of the hearing on the preliminary injunction, and the legal

arguments and briefs of the parties, and having made its findings of fact and conclusions of law;

IT IS THE JUDGMENT OF THIS COURT that as between the State of New Mexico and the Mescalero Apache Tribe, 18 U.S.C. 1161 delegates to the Mescalero Apache Tribe the sole authority to regulate the licensing of tribally operated outlets within the exterior boundaries of its reservation and to regulate the sale of alcoholic beverages by those outlets. Therefore, the Mescalero Apache Tribe need not comply with any state liquor licen.e requirements, nor may any officer or agents of the State of New Mexico enter upon the Mescalero Apache Reservation to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation, nor may they take any action against wholesale suppliers that would result in the cessation of liquor sales within the Reservation at tribally operated outlets.

IT IS FURTHER ORDERED that

defendants and all those persons acting under their control or in concert with them are permanently enjoined from taking any action against the Mescalero Apache Tribe or its suppliers that would result in the cessation of liquor sales by the Tribe at any tribal owned outlet within the outer boundaries of the reservation; and defendants and all those persons acting under their control or in concert with them are permanently enjoined from ordering state law enforcement personnel to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation.

_____

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA Plaintiff vs STATE OF NEW MEXICO and CARLOS L. JARAMILLO, Director Department of Alcoholic Beverage Control Defendants	)

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. The Mescalero Apache Tribe was recognized by the United States Government in the Treaty of July 1, 1852, 10 Stat. 979 between the United States and representatives of the Mescalero Apache Nation.

2. Article 1 of this Treaty places the Mescalero Apache Nation "exclusively under the laws, jurisdiction and government of the United States of America".

3. The Mescalero Apache Indian Reservation was created by a series

of eight executive orders dating from May 23, 1873, to February 17, 1912. Substantially all of the lands within the present outer boundaries of the reservation are held in trust by the United States for the Mescalero Apache Tribe.

4. The Mescalero Apache Tribe has a constitutional government organized pursuant to 25 U.S.C. Section 476, and the government exercises full traditional powers of tribal self-government over the entire Reservation excepting the control surrendered to the United States as trustee.

5. The Mescalero Apache Tribe has adopted an Ordinance published in 30 Fed. Reg. 3553 (March 17, 1965) pertaining to the sale and consumption of alcoholic beverages within the exterior boundaries of the Mescalero Apache Reservation.

6. 18 U.S.C. Section 1161 makes the Federal Indian Liquor Laws inapplicable to:

> "...any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs, and with an ordinance duly adopted by the tribe having jurisdiction over such area

of Indian country, certified by the Secretary of the Interior, and published in the Federal Register".

7. The Mescalero Apache Tribe has owned and operated a tribal bar in the community of Mescalero for a period of ten (10) years without a state license to do so.

8. On April 2, 1965, Mr. H. E. Babcock, Jr., as Chief of the New Mexico Division of Liquor Control stated in a letter to the Mescalero Apache Tribe's Counsel that an Indian tribe could establish its own liquor operation on reservation land without coming under the Liquor Division's control.

9. Alcoholic beverages are presently being sold at the Inn of the Mountain Gods resort complex and the tribal bar at Mescalero without a state license, without a tribal license and without any other type of license authorizing liquor sales.

10. Under the Ordinance referred to in paragraph 5 above, the Mescalero Apache Tribe is not required to obtain a liquor license in order to sell intoxicating beverages within the exterior boundaries of the Reservation.

11. Alcoholic beverages have been

sold at the Inn of the Mountain Gods since July, 1975.

12. The Inn of the Mountain Gods, the tribal bar located in the Village of Mescalero, and the New Mexico licensed bar owned by the Tribe at Apache Summit are all located within the exterior boundaries of the Mescalero Apache Reservation.

13. The enterprise at the Inn of the Mountain Gods which is owned and operated by the Mescalero Apache Tribe was constructed and opened after a feasibility study was made by the Bureau of Indian Affiars.

14. The revenue from the Inn of the Mountain Gods is being used and will continue to be used for the education, social and economic welfare and governmental needs of the Mescalero Apache people.

15. The Inn of the Mountain Gods enterprise is owned and operated by the Tribe according to tribal authority granted under Article XI of the Mescalero Apache Tribal Constitution.

16. Plans and specifications for the construction of the Inn of the Mountain Gods were approved by the

Federal Government.

17. The approval of the Bureau of Indian Affiars is required for the budget for each fiscal year for operation of the Inn of the Mountain Gods.

18. The Mescalero Apache Tribe maintains a full staff of eight persons available to enforce tribal ordinances who are not commissioned New Mexico peace officers.

19. The Federal Government has six full-time and two part-time (averaging a total of forty hours per week) officers on the Mescalero Apache Reservation for enforcement of Federal Law who are not commissioned New Mexico peace officers.

20. Because of state quota restrictions, it would cost in excess of $50,000.00 to purchase a license for use at the Inn of the Mountain Gods, and this would constitute a financial burden on the Mescalero Apache Tribe.

21. The State of New Mexico has never taken steps under 25 U.S.C. Sections 1321 and 1322 or Public Law 280 to assume civil or criminal jurisdiction over the Mescalero Apache

Reservation and could not now do so without the consent of the Mescalero Apache Tribe.

22. The State of New Mexico has in the past ordered all wholesalers in the State of New Mexico to cease delivery to the Tribal bars and has threatened to do so in the future.

23. The State of New Mexico has threatened to send its law enforcement personnel into the Mescalero Reservation to enforce state laws concerning the licensing and regulation of liquor sales.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of this lawsuit.

2. The Mescalero Apache Tribe is a tribe of Indians duly recognized by the Federal Government and said tribe has jurisdiction over the territory of the Mescalero Apache Reservation.

3. The Mescalero Apache Tribe has exercised the option granted it by 18 U.S.C. 1161 to regulate the licensing, sale and distribution of alcoholic beverages within the Mescalero Apache Reservation.

4. 18 U.S.C. 1161 does not require the Mescalero Apache Tribe to meet any state licensing requirements to operate tribal-owned liquor outlets.

5. 18 U.S.C. 1161 does not grant the State of New Mexico jurisdiction to enforce any of its liquor laws within the exterior boundaries of the Mescalero Apache Reservation.

6. The State of New Mexico may not forbid wholesale suppliers of the Mescalero Apache Tribe from selling to tribal-owned outlets.

7. As between the Mescalero Apache Tribe and the State of New Mexico, the Mescalero Apache Tribe has sole jurisdiction for regulating the licensing, sale, possession and distribution of alcoholic beverages at tribal-owned outlets within the exterior boundaries of the Mescalero Apache Reservation.

8. The 21st Amendment to the United States Constitution does not give the State of New Mexico jurisdiction to enforce any of its liquor laws within the exterior boundaries of the Mescalero Apache Reservation.

9. The federal government and the Mescalero Apache Tribe have preempted the State of New Mexico from any jurisdiction it might arguably have had to regulate the licensing of tribal-owned liquor outlets and to regulate the sale of alcoholic beverages at such outlets within the exterior boundaries of the Mescalero Apache Reservation.

10. 18 U.S.C. 1161 was designed to further Tribal self-government and imposition of the State's licensing regulations against the Mescalero Apache Tribe or enforcement of state liquor law by the state within the Mescalero Apache Reservation would be an unwarranted interference with tribal self-government.

11. Plaintiff is entitled to a permanent injunction to enjoin the State and its officers and agents from entering upon the Mescalero Apache Reservation to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation, and further enjoining them from prohibiting wholesalers from

selling to tribal-owned outlets.

12. Article I, Section 8, Clause 3 of the United States Constitution gives the sole authority to the Congress of the United States to regulate commerce with the Indian tribes.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

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UNITED STATES DISTRICT JUDGE

Office - Supreme Court
FILED
ALEXANDER L. STEVAS,

No. 82-401

IN THE

Supreme Court of the United States

October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA, STATE OF SOUTH DAKOTA, COUNTY OF MAHNOMEN, MINNESOTA AND STATE OF FLORIDA DEPARTMENT OF BUSINESS REGULATION IN SUPPORT OF PETITIONER BAXTER RICE

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IN THE

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No. 82-401

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA, STATE OF SOUTH DAKOTA, COUNTY OF MAHNOMEN, MINNESOTA AND STATE OF FLORIDA DEPARTMENT OF BUSINESS REGULATION IN SUPPORT OF PETITIONER BAXTER RICE

INTEREST OF AMICI CURIAE

The Amici have a strong interest in the issues presented by this appeal relating to the scope and effect of 28 U.S.C. §1161. There are eleven Indian reservations in Minnesota, at least six reservations in South Dakota, and five reservations in Florida which currently are recognized by the Department of the Interior. Reservation land occupies large amounts of territory in all three states.[1] The County of Mahnomen is located entirely within a recognized Indian reservation. Questions regarding the enforceability of tribal and state liquor laws have already been raised within various reservations in the states, and in some cases citations have been issued for alleged violations of liquor laws. The resolution of this case will obviously have a substantial impact with regard to the regulation of liquor transactions in large areas of the states. The court of appeals' language regarding exclusive tribal jurisdiction is especially troublesome in a state like Minnesota, where on some reservations the non-Indian population is two or three times the Indian population and the majority of land is owned by non-Indians. Therefore, the Amici wish to participate here in order to present their views regarding certain aspects of the substantive issues presented by this appeal.

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[1] For example, in Minnesota reservations encompass approximately 2.5 million acres — about 4.6% of the total area of the state.

SUMMARY OF ARGUMENT

The Amici are writing separately in order to express their concern about the unnecessary and, in their view, incorrect conclusion of the court of appeals that 18 U.S.C. §1161 vests a resident Tribe with "exclusive jurisdiction to license and distribute liquor on the reservation. . . ." 678 F.2d 1340, 1342. The Amici's basic position is that Congress, when it enacted 18 U.S.C. §1161, was solely concerned with eliminating the blanket federal prohibition against liquor sales within Indian country or to "ward" Indians. That prohibition had long been considered discriminatory against Indians. In its stead Congress chose to substitute a so-called local option whereby the federal prohibitions against liquor sales would be applicable only where local laws—both state and tribal—were not followed. *See generally, United States v. Mazurie*, 419 U.S. 544, 547 (1975); Department of the Interior, *Federal Indian Law* at 135, 262 and 382 (GPO 1958). Unlike Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360), the statutory provision dealing with liquor was not intended as an affirmative grant of jurisdiction to either the states or to the tribes. Neither was the liquor statute intended to deprive the states or tribes of any governmental authority they might otherwise have under applicable law. Indeed, by removing the blanket prohibition against possession and sale of liquor in Indian country, Congress removed the federal government in large part from the field of liquor regulation, and effectively opened the way for the exercise of state and tribal jurisdiction over the subject matter.

ARGUMENT

I. SECTION 1161 WAS INTENDED MERELY TO ELIMINATE THE DISCRIMINATORY TREATMENT OF INDIANS RESULTING FROM THE FEDERAL LIQUOR LAWS.

A. The Legislative History and Surrounding Circumstances.

The provisions of 18 U.S.C. §1161 were enacted into law as part of the Act of August 15, 1953. 67 Stat. 586, §2. As originally introduced, this legislation was designed to apply only to the Indians of Arizona. *See* "A Bill To Terminate Federal Discrimination Against The Indians of Arizona," H.R. 1055, 83d Cong., 1st Sess. (1953). When this bill was reported out of the House Committee on Interior and Insular Affairs, the original enacting clause was stricken and was replaced with substitute language. The substitute language incorporated most aspects of the original bill but made the bill's provisions applicable nationally. *Compare* H.R. 1055, *supra*, as originally introduced with, *e.g.*, H.R. Rep. No. 775, 83d Cong., 1st Sess. at 1 (1953); 99 Cong. Rec. 9959 (1953).

In order to reflect the broader scope of this substitute bill, its title was amended to read "A Bill To Eliminate Certain Discriminatory Legislation Against Indians In The United States." *See, e.g.*, H.R. Rep. No. 775, *supra* at 2; 99 Cong. Rec. 9959 (1953). The new version of H.R. 1055 was subsequently passed by the Senate with minor amendments. *See* S. Rep. No. 722, 83d Cong., 1st Sess. at 1 (1953); 99 Cong. Rec. 10800-02 (1953). After the House concurred in the Senate amendments (99 Cong. Rec. 10928 (1953)), H.R. 1055 was signed into law as Public Law 83-277. As enacted into law,

this legislation effectively repealed the prohibitions against the sale and possession of liquor in Indian country except where such is prohibited by state or tribal law. *See, e.g.*, S. Rep. No. 722, *supra* at 1; Hearings on H.R. 1055 held before House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs (March 18, 1953), Pet. Br., App. A at 9-21, a-26 - a-27 (Statements of Dillon S. Meyer, Commissioner of Indian Affairs;[2] *Federal Indian Law*, *supra* at 382. *See also United States v. New Mexico*, 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

Efforts to change the federal liquor laws had begun several years prior to the Eighty-Third Congress. As early as 1949, bills were introduced in Congress to amend or repeal the long-standing blanket prohibition (18 U.S.C. §§1154, 1156) against liquor sales within Indian country or to "ward" Indians. *See, e.g.*, H.R. 4941, 81st Cong., 1st Sess. (1949). Similar bills—either national in scope or aimed at Indians located in particular states—were introduced in succeeding sessions of Congress. *See, e.g.*, H.R. 6238, 82d Cong., 2d Sess. (1952); H.R. 6703, 82d Cong., 2d Sess. (1952); H.R. 6879, 82d Cong., 2d Sess. (1952); S. 485, 83d Cong., 1st Sess. (1953); S. 1080, 83d Cong., 1st Sess. (1953); H.R. 520, 83d Cong., 1st Sess. (1953).

Although these bills met with little success, it is significant and striking that each was intended to amend the existing federal liquor laws for the avowed purpose of eliminating the discrimination against Indians that resulted from the application of such laws. *See, e.g.*, H.R. 4941, *supra* at 1 (Title); H.R. 6238, *supra* at 1 (Title); H.R. 6703, *supra*, §§1-3 and

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[2] This and other House Subcommittee and Committee Hearings held on H.R. 1055 are reproduced in the Appendix to the Petitioner's Brief.

Title; H.R. 6879, *supra*, §§1-3 and Title; S. 485, *supra*, §§1-3 and Title; S. 1080, *supra* at 1 (Title). It is evident from these bills that the express, and probably sole, motivation for seeking to change the liquor laws was to eliminate the perceived discrimination against Indians. The pertinent remarks in the Congressional Record regarding these bills offer confirmation of this assessment. *See, e.g.*, 95 Cong. Rec. A5489 (1949) (extension of remarks of Rep. D'Ewart); 99 Cong. Rec. A1388-A1389 (submissions of Sen. Magnuson), A1978-A1979 (extension of remarks of Sen. Goldwater) (1953). It is of particular significance that there was no reference to state or tribal jurisdiction with regard to those liquor transactions which were to be affected by the proposed legislation.

The legislative history of the bill which finally became law (H.R. 1055) follows much the same pattern. From introduction to amendment to enactment, this bill was consistently labelled as a bill to eliminate certain discrimination against Indians resulting from federal laws. *See, e.g.*, 99 Cong. Rec. 9959 (1953). The Congressional Committee Reports, the Subcommittee Hearings, and the remarks and submissions contained in the Congressional Record all also constantly emphasized the need to eliminate the discriminatory effects of the federal laws on Indians. H.R. Rep. No. 775, *supra* at 2-3; S. Rep. No. 722, *supra* at 3; 99 Cong. Rec. 10800-02 (submissions of Sen. Goldwater), 10928 (remarks of Rep. Miller), A2782-A2783 (extension of remarks of Rep. Patten) (1953); Hearings on H.R. 1055, *supra*, Pet. Br. at App. A. As the House Committee Report emphatically stated:

> It is the hope of the Committee . . . that all legislation discriminating against our Indian citizens may be abolished. Termination of the subjection of Indians to Federal laws applicable only to Indians certainly appears to be desirable . . . .
>
> * * *

> The Indians for many years have complained that the liquor laws are most discriminatory in nature. . . . Inasmuch as Indians are expected to assume the responsibilities of citizenship and serve in the Armed forces on an equal basis with other Americans, the committee sees no reason for continuing legislation that is applicable only to Indians.

H.R. Rep. No. 775, *supra* at 2. *Accord* S. Rep. No. 722, *supra* at 2.

Thus, H.R. 1055 was the culmination of the earlier proposed legislation concerning this subject. As with the earlier proposals, the prime motivation underlying H.R. 1055 was the elimination of discriminatory treatment of Indians with regard to liquor transactions. Furthermore, as with the earlier proposals, the history of H.R. 1055 contains no explicit reference to state or tribal jurisdiction over liquor transactions once federal prohibitions were removed.

The language ultimately employed by Congress confirms that it was concerned primarily with the discriminatory aspects of the pre-1953 federal liquor laws applicable to Indians.[3] It is specifically provided in 18 U.S.C. §1161 that the various federal prohibitions regarding the possession and sale of liquor in Indian country shall not apply when

> the act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area . . . .

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[3] Legislation intended to remedy this problem in other contexts was also enacted into law by the Eighty-Third Congress. *See, e.g.*, Public Law 83-281; H.R. Rep. No. 268, 83d Cong., 1st Sess. at 2 (1953); S. Rep. No. 793, 83d Cong., 1st Sess. at 2-4 (1953).

By enacting this provision, Congress incorporated the applicable state and tribal law into federal law. As a result, where the act or transaction is in conformity with state and tribal law, it becomes lawful under the federal statute. *See also* S. Rep. No. 722, *supra* at 2 (letter of the Ass't Secretary of the Interior); H.R. Rep. No. 775, *supra* at 3 (letter of the Ass't. Secretary of the Interior). In short, Congress had, in the guise of §1161, left the matter of liquor regulation to State and tribal governments. *See generally, United States v. Mazurie*, 419 U.S. at 547; *Federal Indian Law, supra* at 135, 262 and 382.[4]

Contemporaneous federal administrative interpretation also was consistent with the foregoing analysis. The Department of the Interior—the federal agency primarily responsible for implementation of federal policies and laws regarding Indians (*see, e.g.*, 25 U.S.C. §2)—consistently recognized that §1161 was designed to eliminate the discriminatory aspects of the federal liquor laws. *See, e.g.*, 1954 Annual Report of the Secretary of the Interior at 244; Solicitor Memorandum M-36447, II Op. Sol.—Dept. Int. Ind. Aff.[5] 1803, at 1803-04 (November 6, 1957); *Federal Indian Law, supra* at 382. Illustrative of this recognition is the following observation regarding §1161 made in a 1957 memorandum of the Deputy Solicitor to the

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[4] The supreme court has recognized in a fairly explicit manner the opening of the field to state and tribal regulation. In *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962), the court stated with regard to §1161:

> Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. [Citation omitted.] Thus, Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

[5] This citation refers to the two-volume publication of the Department of the Interior entitled "Opinions of the Solicitor for the Department of the Interior relating to Indian Affairs."

Commissioner of Indian Affairs: "As its title clearly states it was designed to eliminate discriminatory legislation against the Indians. . . ." II Op. Sol., *supra* at 1803-04.

B. The Errors of the Court of Appeals.

It should be evident from the preceding discussion that the Ninth Circuit incorrectly interpreted the scope and intent of §1161 in two major respects. First, there is no basis for that court's conclusion that §1161 incorporated only the "substantive standards" of state law while incorporating all aspects of tribal law, substantive or otherwise. 678 F.2d at 1344-45. This reading is plainly at odds with the language and history of §1161. As pointed out earlier, the statute provides simply that the federal prohibitions against the sale and possession of liquor in Indian country will not apply where the act or transaction is "in conformity both with" state law and tribal ordinance. The express language of §1161 requires that both state and tribal laws are to be incorporated equally. Nowhere in the legislative history is there even the slightest hint that one law was to be more or less applicable than the other.

Contemporaneous federal administrative interpretation again supports the conclusion that both state and tribal laws are to be treated equally. *See, e.g.*, Solicitor Memorandum M-36241, II Sol. Op.—Dept. Int. Ind. Aff. 1648, at 1649 (September 22, 1954); *Federal Indian Law*, *supra* at 382-83. As the Acting Solicitor succinctly stated in 1954 regarding the applicability of state and tribal law under §1161, "[t]he scope of neither appears to be limited by the Act." II. Op. Sol., *supra* at 1649. The wording of the statute and the interpretation of it by federal agencies demonstrate that, in enacting §1161, Congress intended to incorporate state and

tribal law to the same extent. That means that either (1) the substantive provisions *only* of both state and tribal law were adopted by §1161, or (2) *all* requirements and prohibitions of the state and tribal liquor laws were so adopted. The Amici believe the most supportable conclusion is that Congress referred to *all* requirements of state and tribal laws.[8] *See Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976).

The second error of the court of appeals is its conclusion that §1161 vests the Tribe with "exclusive jurisdiction to license and distribute liquor on the reservation", thereby ousting State jurisdiction. 678 F.2d at 1342. That conclusion is overbroad, particularly to the extent it applies to non-Indians, and finds no support in the statute or its legislative history. As was shown in this brief's earlier discussion of the scope and intent of 18 U.S.C. §1161, the primary concern of Congress in enacting the provision was with the discriminatory aspects of the federal liquor laws. Section 1161 is merely

[8] There is no indication anywhere in the legislative history that Congress intended that only the substantive provisions of the applicable state and tribal laws were to be incorporated. Indeed, because the reference to state and tribal laws is without limitation, it would appear that Congress intended to require compliance with all requirements and prohibitions of state and tribal law, substantive or otherwise. *See* Hearings on H.R. 1055 held before the House Committee on Interior and Insular Affairs (June 2, 1953) Pet. Br., App. C at a-68 - a-69 (statement of Rep. Patten, sponsor of H.R. 1055). The contemporaneous administrative treatment of §1161 suggests that as well. *See, e.g.*, Solicitor Memorandum M-36241, II Op. Sol., *supra*, 1649-50 (suggests "terms" and "conditions" of both state and tribal law applicable); *Federal Indian Law*, *supra* at 382-83 (suggests licensing requirements of state law applicable). Thus, what Congress most likely intended is that for an act or transaction to be lawful under federal law, it must be lawful under state and tribal law, which would, in turn, require conformity with all aspects of those laws.

the means by which Congress chose to remedy this problem. *See also* Solicitor Opinion M-36447, II, Op. Sol., *supra* at 1803-04. In no way was the statute a grant of jurisdiction to either the state or the tribe; nor was it a withdrawal of state or tribal jurisdiction. As the legislative history amply shows, Congress simply was not concerned with state or tribal jurisdiction over the sale and possession of liquor in Indian country; instead it was concerned with discriminatory treatment of Indians by virtue of its own prohibitory legislation. Indeed, in view of the fact that §1161 was a component of the then prevailing federal policy of terminating federal responsibility over Indians (*compare Federal Indian Law, supra* at 262 *with Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962), it is unlikely that Congress would have granted exclusive tribal jurisdiction over the possession and sale of liquor in Indian country without explicitly saying so.

How then should the question of state and tribal jurisdiction over the sale and possession of liquor on-reservation be resolved? Prior to the enactment of §1161, virtually all sale and possession of liquor within Indian country was banned under federal law. *See, e.g.*, 18 U.S.C. §§1154, 1156; *Federal Indian Law, supra* at 380, 381-82. The practical effect of this ban was that no room was left for state or tribal regulation.[7] With enactment of §1161, however, this blanket prohibition was lifted, opening the way for concurrent state and tribal

[7] From time to time, however, some states prior to 1953 supplemented the federal prohibitions by enacting concurrent state prohibitions against the sale of liquor. For example, the State of Utah enacted a law in the early 1900's prohibiting the sale of liquor to anyone within ten miles of an Indian reservation. *See, e.g.*, Public Documents—State of Utah Part I, Section 5 at 94-95 (1905-06) (Opinion No. 66 of the Attorney General, dated March 24, 1906).

regulation. Contrary to the conclusion of the court of appeals (678 F.2d at 1343), there is simply nothing in the act itself or the underlying legislative history which suggests an intent on the part of Congress to exclusively control the sale and possession of liquor in Indian country. In fact, because §1161 also repealed the enforcement provisions of the federal liquor laws (18 U.S.C. §§3113, 3488, and 3618), it is unlikely that Congress intended to pre-empt the field.

Since §1161 is neither an exclusive grant of jurisdiction to tribes nor is pre-emptive, the generally established principles regarding the division of governmental authority within reservation boundaries should govern questions of state and tribal regulation of liquor transactions.[8] Thus, whether the *state* has jurisdiction over possession and sale of liquor by *non-Indians* will depend essentially on whether the exercise of authority is pre-empted by some other federal law or whether it interferes with tribal self-government. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973). *See also Washington v. Confederated Tribes of*

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[8] So too may the "presumption in favor of the validity of the state regulation in this area that the Twenty-First Amendment requires . . . ." (*California v. LaRue*, 409 U.S. 109, 118-19 (1972) play a role here since it has long been established that "[Indian] Reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards . . . ." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). *See generally, United States v. State Tax Comm'n. of the State of Mississippi*, 421 U.S. 599, 613-14 (1975); *United States v. State Tax Comm'n. of Mississippi*, 412 U.S. 363, 373-77 (1973).

the Colville Indian Reservation, 447 U.S. 134, 154-159 (1980).[9] Whether the *state* has jurisdiction over the possession and sale of liquor by *Indians* will likely focus on the applicability and scope of particular federal statutes such as Public Law 83-280 and similar legislation.[10] Whether the *Tribe* has jurisdiction over *non-Indians* will largely depend on the examination of a number of factors not considered by the lower court. *See, e.g., Merrion v. Jicarilla Apache Tribe*, —— U.S. ——, 101 S.Ct. 894, 901-05 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

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[9] Some courts have already answered these questions by acknowledging that non-Indian liquor sellers located in Indian country must have state licenses in conformity with state law in addition to any required tribal license. *United States v. Morgan*, 614 F.2d 166, 171 (8th Cir. 1980); *Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976). Furthermore, the existence of a state license for non-Indians was a factor in *United States v. Mazurie*, 419 U.S. 544, 548 (1975) and no questions were raised there about the applicability of state license requirements.

[10] The court of appeals summarily concluded that Public Law 280 is inapplicable here on the basis that California's licensing scheme is "regulatory." 678 F.2d at 1350. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). Although the Amici strongly disagree with this conclusion, this issue was not presented by the Petition and therefore is not before the court.

CONCLUSION

In conclusion, the court of appeals made two significant mistakes in this case. It erroneously decided that §1161 did not encompass *all* aspects of state as well as tribal law. It also incorrectly and unnecessarily concluded that §1161 gave tribes exclusive governmental authority in Indian country and ousted all state jurisdiction. In making its ruling the court moreover failed to examine the issues and factors which are critical to a determination of how much jurisdiction a state or tribe may exercise over liquor transactions. These mistakes require reversal.

Dated: December 15, 1982.

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No. 82-401

In The
Supreme Court of the United States
October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

EVA REHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Does 18 U. S. C. § 1161 exclude state license requirements and regulation of the importation, distribution, and sale of alcoholic beverages in "Indian country" within a state's boundaries?

If 18 U. S. C. § 1161 does exclude state exercise of these powers, does it violate the Twenty-first Amendment?

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No. 82-601

In The

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October Term, 1982

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California,

Petitioner,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF MONTANA IN SUPPORT OF PETITIONER

INTEREST OF THE STATE OF MONTANA

All of the fifty states exercise control over the sale and distribution of alcoholic beverages. Montana is one of eighteen states which regulates the sale and distribution of liquor through a state monopoly system. The remaining thirty-two states, including California, are "license" states which regulate distribution and sales of liquor through a system enforced through licensing. *Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1977*, pp. 26-27.

Montana has a vital interest in maintaining order in the liquor traffic within its boundaries. Like all other states, Montana regulates liquor traffic as part of its general "police power", recognizing that it has a duty to balance effectively the well-known deleterious effects of alcohol availability against the responsible consumption of alcoholic beverages which numerous citizens—on and off Indian reservations—find enjoyable.[1] The Ninth Circuit opinion gives Indian tribes exclusive control of liquor traffic within Indian country. If left standing, the Ninth Circuit opinion will destroy the finely honed and pervasive statutory schemes for liquor regulation developed by Montana and all other states having Indian reservations within their boundaries.

Montana has long regulated liquor traffic statewide—the only geographic exception has been Indian reservations where, prior to 1953, Congress forbade the distribution or possession of liquor. Since 1953 when Congress passed the Act of August 15, 1953, P. L. 83-277, 67 Stat. 586, 18 U. S. C. § 1161, creating a right to possess liquor in Indian country in conformity with state law, Montana has asserted its regulatory control on Indian reservations where liquor is sold.

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[1]Montana ranks second, nationwide, in beer consumption, with a consumption rate of 35.78 gallons per capita; 13th nationwide in wine consumption, with a consumption rate of 2.57 gallons per capita; and 27th nationwide in distilled spirits consumption, with a consumption rate of 1.97 gallons per capita. *Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1980*, p. 19, Table 14.

Montana's liquor[2] regulation laws are all-encompassing.[3] Montana limits the number of liquor licenses by population through its "quota system."[4] It imposes a liquor license tax and beer and wine taxes which are earmarked for specific uses. The liquor license tax, M. C. A. § 16-1-405, is distributed in proportion to consumption, to the counties and incorporated cities and towns for law enforcement and the regulation and control of the sale and use of liquor, and to the Montana Department of Institutions for the treatment, rehabilitation and prevention of alcoholism. M. C. A. § 16-1-404(3). Similarly, the beer tax is distributed to incorporated cities and towns for use "for state purposes such as law enforcement, maintenance of the transportation system and public health." M. C. A. § 16-1-410. The tax on wine goes, in part, to the general fund of the state, and to the ear-

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[2]Although the Montana statutes distinguish among "liquor," beer, wine and table wine, Mont. Code Ann. [hereinafter M. C. A.] § 16-1-106, this brief includes all alcoholic beverages in the word "liquor" unless otherwise stated.

[3]The stated policy of the "Montana Alcoholic Beverage Code" is "to effectuate and ensure the entire control of the manufacture, sale and distribution of liquor within the State of Montana . . . [as] an exercise of the police power of the state, in and for the protection of the welfare, health, peace, morals and safety of the people of the state, and its provisions shall be construed for the accomplishment of such purposes." M. C. A. § 16-1-101. Montana's regulation of the sale and distribution of liquor is an unquestioned proper governmental function with the police power of the state. *State v. Andre*, 101 M. 366, 371, 54 P. 2d 566 (1936).

[4]In the November 1982 election, Montana's voters resoundingly defeated an initiative which would have done away with this quota system for purposes of licensing on-premises consumption of beer and wine. The Montana electorate, which of course includes Indian voters, showed its desire to continue the current system of limiting licenses.

marked funds for the Department of Institutions and the cities, towns and counties for use in alcoholism and law enforcement related services. M. C. A. § 16-1-411(3). The tribes on the Flathead, Blackfeet and Fort Belknap reservations receive state liquor license tax and beer and wine tax funds through the Montana Department of Institutions for tribal on-reservation Indian alcoholism treatment programs.

Montana regulates all alcoholic beverages within the state.[5] Beer and wine may be distributed only to licensees of the state. Liquor (other than beer and wine) must be obtained through state liquor stores, either directly by the consumer, or by limited licensed outlets for re-sale.[6] Thus, there is now no legal way to obtain liquor, beer and wine in Montana without complying with Montana's regulatory system. M. C. A. Title 16, ch. 1-6.

The Ninth Circuit opinion in this case is exceptionally threatening to Montana because there are seven Indian reservations within the state's boundaries. Two of these, the Crow and the Northern Cheyenne Indian Reservations, are "dry" reservations, where the resident tribes have opted not to allow on-reservation liquor transactions to take place. The remaining five Montana Indian reservations where liquor transactions do take place are not isolated, purely Indian enclaves. On the contrary,

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[5]See note 8 *infra* for an administrative exception.

[6]The Montana monopoly on liquor (as opposed to beer and wine) affects availability and consumption. Montana's rank of second nationwide in consumption of beer, which is readily available from distributors, contrasts dramatically with its rank as 27th in the per capita consumption of liquor, which is available only through the state liquor stores. See note 1 above.

of their total population of approximately 39,919 people, more than half, approximately 23,363, are non-Indians.[7] The state operates liquor stores on these five Indian Reservations, with total sales in the state stores alone amounting to $2,497,222.00 in fiscal year 1981-82. Additionally, the state licenses various establishments selling alcohol on these reservations under its quota system. On at least two of these five Reservations, to the state's knowledge, the resident tribes either have adopted an approved ordinance regarding tribal licensing of the sale of some alcoholic beverages, or are in the process of having such licensing ordinance approved. These reservations are the Blackfeet Reservation, where approximately 25% of the population is non-Indian, and the Flathead Reservation, where approximately 87% of the population is non-Indian. On the Flathead Reservation, the Confederated Salish and Kootenai Tribes have leased four Tribal Community Centers to Tribal members, and beer and wine are served there without state licenses.[8]

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[7]The source for this information is *Census of Population and Housing, 1980: P. L. 94-171 Population Counts,* Summary Tape File. The population breakdown for the five reservations on which liquor transactions take place is as follows: 6,660 people on the Blackfeet Reservation, 1,578 of whom are non-Indian; 19,628 people on the Flathead Reservation, 15,852 of whom are non-Indian; 2,060 people on the Fort Belknap Reservation, 184 of whom are non-Indian; 9,921 people on the Fort Peck Reservation, 5,648 of whom are non-Indian; and 1,650 people on Rocky Boy's Reservation, 101 of whom are non-Indian.

[8]Approximately one year ago, while this case was pending in the Ninth Circuit, the Confederated Salish and Kootenai Tribes passed their beer and wine ordinance setting forth the requirements for tribal licenses, including that all state law requirements be met, except actual acquisition of a state license.

(Continued on next page)

Montana anticipates an increased number of liquor outlets on Indian reservations should this Court affirm the Ninth Circuit's decision.[9] The large non-Indian populations living on or near Indian reservations would take advantage of the increased availability of liquor. Moreover, two of the reservations abut, include or are enroute to major tourist attractions: Flathead Lake and Glacier National Park. Other Montana reservations are located on major thoroughfares for interstate travel. Obviously, tourists (both Indian and non-Indian) could be expected to take advantage of the increased number of liquor outlets.

The inevitable result of exclusive tribal licensing is that the state's legitimate exercise of police power in total regulation of liquor will be defeated. Maintenance of the state-wide license quota system, if operative only outside of Indian country as defined in 18 U. S. C. § 1154(c), will be an exercise in futility. Instead the Indian tribes on Montana's seven reservations, easily accessible to on and off-reservation residents and tourists, could impose their

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(Continued from previous page)

Beer and wine distributors, prohibited by Montana law from delivering to anyone without a Montana license, pressed the Montana Department of Revenue for a policy statement about deliveries to tribal licensees. Rather than precipitate litigation when faced with this dilemma, the Department promulgated a temporary policy pending this litigation, and notified distributors that Montana would not attempt to prohibit deliveries to tribal licensees under a tribal ordinance which, in effect, adopted virtually all of the Montana licensing requirements and which did not interrupt Montana's tax collections.

[9]According to the Ninth Circuit, the tribe could determine whether or not any license from the tribe is required. It is possible that tribes might adopt an ordinance simply authorizing sales of liquor without any licensing requirements.

respective (and very probably uncoordinated) systems upon Indians' and non-Indians' liquor transactions, effectively vitiating the carefully developed state regulatory scheme. Montana and its citizens would be stripped of ability to limit availability of alcohol and fund law enforcement and alcoholic treatment programs from alcohol related taxes. Tribal governments could not provide substitute services to non-Indian populations on and near their reservations, once the state regulatory system was destroyed.

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SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case vests an Indian tribe with exclusive control over liquor transactions in Indian country. This tribal control would exist regardless of whether the sellers and purchasers are Indian or non-Indian. The state is thus ousted from exercising its legitimate governmental police power over these liquor transactions, even though they include numerous sales to non-Indians.

All states traditionally have controlled and regulated the sale of liquor within their borders as a proper exercise of state police power, except for the years between 1920 and 1933 when prohibition was in effect, and except with regard to Indian tribes, prior to 1953 when no liquor transactions in Indian Country were permitted by any one under any circumstances. The Twenty-first Amendment to the United States Constitution expressly authorizes this state police power. Since 1953, when it passed 18 U. S. C. § 1161, Congress has statutorily recog-

nized the state's power on Indian reservations, so long as the resident Tribe enacts an ordinance allowing liquor transactions within its "Indian country" as defined by 18 U. S. C. § 1154(c). The language, intent, and legislative history of 18 U. S. C. § 1161 all show that Congress intended that states' regulatory authority over liquor transactions does include Indian reservations. Congress recognized the common situation where non-Indians are at least as likely as Indians to be involved in on-reservation liquor transactions. This Court should reverse the decision of the Ninth Circuit and enable the states to continue to license and otherwise regulate the sale and distribution of liquor in Indian country.

ARGUMENT

Liquor is a unique subject matter which is a most appropriate subject for the exercise of state police powers. History teaches us that questions involving liquor regulation are among the most vexing questions which governmental entities address. For many years the Nation itself struggled with the question of whether alcohol should be available to any citizen. This struggle culminated in ratification of the Eighteenth Amendment prohibiting anyone in the United States from making, distributing or consuming alcoholic beverages. After thirteen years of Prohibition, the Twenty-first Amendment was ratified, repealing Prohibition and leaving to the states the power to regulate liquor traffic. That Amendment states in pertinent part that the "transportation or

importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor, *in violation of the laws thereof* is hereby prohibited." (emphasis supplied).

Consistent contemporaneous case law from this Court holds that the intent of the Twenty-first Amendment was to grant to states regulatory authority over alcoholic beverages within their borders, even to the point of overriding the provisions of the "commerce clause" (Art. I, § 8, cl. 3) of the United States Constitution. *E.g. State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, *rehearing denied*, 299 U. S. 623 (1936).[10] It is the "commerce clause" which authorizes Congress to exercise legislative power with respect to Indian tribes, *e.g., United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876), so that the overriding intent of the Twenty-first Amendment and the power it grants states over the control of liquor is particularly significant here.

Notwithstanding the Twenty-first Amendment's recognition of state authority to regulate liquor traffic, Congress grappled for years with the question of whether Indians and Indian country should be subject to a special prohibition from possession or distribution of liquor. Prior to 1953, Congress completely prohibited the introduction, possession or sale of liquor in Indian country,[11] or to an Indian in any place. 18 U. S. C. §§ 1154 and 1156.

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[10]As discussed in note 3 *supra*, the Montana Supreme Court has held likewise in relation to Montana's laws relating to liquor within the state borders.

[11]Patrons of all seven Indian reservations in Montana are "Indian Country" as defined in 18 U. S. C. § 1154 (c).

Prior to 1953, neither Indians nor Indian tribes had any power or control with respect to alcohol on or off of their reservations.[12] Congress did not consider regulation of liquor to be an aspect or function of tribal sovereignty independent of Congressional grant of power to regulate liquor.

In 1953, Congress ended the prohibition against the sale of alcohol to an Indian because it was discriminatory. At the same time, Congress ended the absolute prohibition against the introduction, possession, or sale of liquor in Indian country, "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country." 18 U. S. C. § 1161.

Section 1161, then, recognizes the broad police powers of the states, and on its face *requires* compliance with all state laws. The Twenty-first Amendment prohibits Congress from excluding states from exercising regulatory authority within their boundaries, including in Indian country.

In addition to compliance with state laws, Section 1161 requires that for liquor transactions to be allowed

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[12]Congressional restriction of liquor transactions with Indians began in 1802, and the first federal criminal statutes relating to the introduction of alcohol in Indian country were enacted in 1832. This Congressional prohibition was for the purpose of protecting Indians from unscrupulous white traders and to prevent breaches of the peace and Indian wars and depredations thought to arise from excessive use of liquor by Indians. Cohen, *Federal Indian Law*, 1942, 352-353. *See also*, letter of the Secretary of Interior to Congress in 1946, 92 Cong. Rec. 4533-4534, 79th Cong. 2nd Sess.

in "Indian country" the resident tribe must adopt an ordinance allowing such transactions. Absent the adoption of such an ordinance, "Indian country" within Indian reservations remains "dry." As mentioned *supra,* that is the case in Montana on the Crow and Northern Cheyenne Reservations. This power of Indian tribes to accept or reject the repeal of federal prohibition statutes is the delegation of congressional authority affirmed by this Court in *United States v. Mazurie,* 419 U. S. 544 (1975). However, if a tribe does consent to the repeal of the previous absolute federal prohibition, liquor transactions may occur *only as long as there is also compliance with the laws of the state.*

As discussed above in "Interest of the State of Montana," the thrust of the laws of all of the fifty states in relation to liquor is the regulation of availability of liquor, either by creating a state monopoly system such as in Montana, Washington and sixteen other states, or by licensing according to some sort of "quota system" as is done in California and thirty-one other states. All of the states had these or similar regulations on the availability of liquor in effect in 1953 when Congress passed section 1161.

Given the clarity of language in section 1161, it is not necessary to analyze the legislative history or the intent of Congress in enacting the legislation. However, an examination of why and how section 1161 was passed in 1953, shows conclusively that state authority over liquor transactions in Indian country was intended. Section 1161 was one of various acts approved by the 83rd Congress directed at terminating specific tribes and Indian

reservations completely. Part of this "termination" policy of the United States government was to terminate many responsibilities of the federal government over Indians. This "termination" policy continued from approximately 1945 to 1965. The "cornerstone" of this policy was House Concurrent Resolution 108, which stated that Indian tribes and tribal members should be free "from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." H. R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). House Concurrent Resolution 108 also stated that it was Congress' policy

> as rapidly as possible *to make the Indians* within the territorial limits of the United States *subject to the same laws, and entitled to the same privileges and responsibilities as are applicable to other citizens* of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship: .... (emphasis supplied)

This same 83rd Congress passed section 1161. In discussing a proposed redraft of H. R. 1055, the precursor to section 1161 designed to eliminate federal laws discriminating against Indians in various areas, including liquor, Dillon S. Myer, Commissioner of the Bureau of Indian Affairs, Department of the Interior, on March 18, 1953, said the proposed redraft was

> intended to eliminate all of the sections in the statutes which discriminate against Indians and at the same time not interfere with State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law.

Less than three months after that remark was made, Representative Harold A. Patten of Arizona endorsed an

amendment to H. R. 1055 to insure there would be no liquor sales on or near school grounds, but did so with the comment that such an amendment was in fact unnecessary "because if this bill were passed to remove all discrimination, the Indians would still have to comply with the State law in every regard."[13]

Prior to amendment, section 2 of the original draft of H. R. 1055 required that only off-reservation liquor transactions be "in conformity with" state law; and section 3 required that on-reservation liquor transactions only be "in conformity with" a tribal ordinance.[14] Amendments to these distinctions were proposed[15] and the original draft of the bill was rejected by Congress in favor of the present form, which states that liquor transactions in Indian country must be in conformity with *both* state law and tribal ordinance. The opinion of the Ninth Circuit below is probably an accurate construction of the bill in its original form which seemed to require application of state law off the reservation and tribal law on the reservation. It is not supported by the amended final form, section 1161.

For liquor transactions with Indians outside of Indian country, Congress clearly intended that state regulatory systems apply. Likewise, it intended that state regulatory systems apply to liquor transactions that take

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[13]Report of Proceedings, Hearings on H. R. 1055 Before Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, 83rd Cong., 1st Sess., June 2, 1953, Statement of Representative Harold A. Patten, p. 3.

[14]Report of Proceedings, *ibid.*, H. R. 1055.

[15]Report of Proceedings, *ibid.*, March 18, 1953, Statement of Dillon S. Myer, Commissioner, Bureau of Indian Affairs, p. 8.

place within Indian Country. The plain language of section 1161 mandates that conclusion; the policy of Congress at the time of enactment of section 1161 mandates that conclusion; and the comments on, and the amendments to, the original bill mandate that conclusion.

The purpose and policy of Congress in 1953 is especially relevant in Montana, where the Indian reservations have been opened so extensively to non-Indian visitors and residents. Montana's Indian reservations have not been "terminated" in the sense of the word used in 1953, but they clearly are no longer used only by or for tribal members for whom they were set aside. The well-being of all Montanans requires that these facts be recognized and that the state be permitted to continue to exercise its broad police powers in regulating all liquor traffic.

CONCLUSION

Montana acknowledges that Indian Tribes have the power to enact ordinances with respect to liquor regulation in their own "Indian country." *United States v. Mazurie, supra.* However this power does not, and should not, prevent states from exercising their police power with regard to liquor transactions, which power is sanctioned by the United States Constitution and by the plain language of 18 U. S. C. section 1161. The Ninth Circuit's

decision ousting states from their long-standing authority in this very unique and important area should be reversed.

Respectfully submitted,

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December, 1982

No. 82-651

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1982

WALTER RICE, Individually and as Director of The Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA [redacted],

Respondent,

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF OF THE TULALIP AND MUCKLESHOOT INDIAN TRIBES AS AMICI CURIAE

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In The

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October Term, 1982

BAXTER RICE, Individually and as Director of The Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

EVA REHNER,

Respondent,

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF OF THE TULALIP AND MUCKLESHOOT INDIAN TRIBES AS AMICI CURIAE

This brief is submitted with the written consent of all parties, and in support of the Respondent, Eva Rehner.

INTEREST OF AMICI

The Tulalip and Muckleshoot Tribes have been in litigation with the State of

Washington over the extent of state jurisdiction to regulate tribal liquor transactions within their reservations. Their interest in the disposition of Rice v. Rehner is obvious.[1]

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[1] After the Ninth Circuit decision in Rehner v. Rice, the State of Washington negotiated a settlement with the Muckleshoot Tribe which allows the Tribe to continue to sell liquor on its reservation, even though Washington is a "monopoly" state. The settlement also allows the tribe to sell a pre-set quota of liquor subject only to tribal and federal taxation. Since the settlement may be terminated after five years or upon the breach of certain conditions, the Muckleshoot Tribe still has an interest in the outcome of this case.

The Tulalip Tribe is still assessing the extent to which similar or other settlement terms would meet its governmental objectives in undertaking comprehensive regulation of liquor transactions on its reservation. The Tulalips' claims against the State of Washington are still pending. The Muckleshoot claims have been voluntarily dismissed, without prejudice.

The Muckleshoot settlement is particularly significant in light of Cali-

Because there are certain legal issues common to the Rehner case and the Tulalip and Muckleshoot cases, the Ninth Circuit Court of Appeals consolidated them for argument and issued a joint decision. There are, however, significant differences between the cases. Issues which were not presented by Rice v. Rehner but were presented by the Tulalip and Muckle-

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fornia's assertion that states must have complete authority over liquor transactions on Indian reservations to prevent chaos, and that the term "substantive standards" is too ambiguous to apply. The fact that at least one settlement has been reached in light of the Ninth Circuit ruling, demonstrates that workable arrangements for tribal/state cooperation can be found without subjecting tribes to the full panoply of state liquor laws and jurisdiction. It should also be noted that the Muckleshoot and Tulalip Tribes have been operating their own liquor regulatory systems for over four years now, without any apparent confusion over which state laws the Washington district court considered to be substantive standards nor any accusations that the tribes are violating the district court's order.

shoot cases are now before a district court in Washington. Those issues must await the development of a complete factual record, and full briefing and argument before they can be fairly decided. Furthermore, the state and tribal regulatory schemes involved in the Tulalip and Muckleshoot cases are different from those involved in Rehner. These differences raise some additional considerations not presented by Rehner.

The purpose of this brief is not only to argue in support of Eva Rehner on the common issues which were decided favorably to the tribes by the Ninth Circuit, but also to explain the similarities and differences between the two cases, and to alert the Court to the limits of the issues now before it.

ARGUMENT

I. Similarities and Differences Between Rice v. Rehner and the Washington Cases.

Both the California case of Rice v. Rehner and the Washington cases involving the Tulalip and Muckleshoot tribes questioned whether 18 U.S.C. 1161 authorizes state jurisdiction over the licensing of Indian liquor vendors in Indian country.[2]

The Ninth Circuit Court of Appeals, like the Tenth Circuit before it in United States v. New Mexico, 590 F. 2d 323 (1978), cert. den. 62 L. Ed. 2d 42, properly ruled that neither the Twenty-first Amendment nor 18 U.S.C. §1161

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[2] Neither case involves a dispute over whether the acts or transactions in dispute occur in Indian country.

extended state jurisdiction to Indians distributing liquor on their reservations. The extensive history of federal preemption in regard to reservation liquor transactions, the history, purposes, and prior judicial interpretations of the Twenty-first Amendment and 18 U.S.C. §1161, and the applicable rules of construction all compelled that conclusion. See, e.g., United States v. Sutton, 215 U.S. 291, 295-296 (1909); Hallowell v. United States, 221 U.S. 317, 323 (1910); United States v. State Tax Commission of Mississippi, 421 U.S. 599, 613-614 (1975); Collins v. Yosemite Park and Curry Co., 304 U.S. 518, 538 (1938); United States v. Mazurie, 419 U.S. 544, 555-557 (1975); Bryan v. Itasca County, 426 U.S. 373, n. 2, 388-390, n. 14, 392 (1976). In regard to the licensing issues now before this Court, the Tulalip

and Muckleshoot Tribes contend that this Court's decision in Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is dispositive. As discussed more fully in the next section, the Court ruled in that case that, absent express Congressional authorization, states have no authority to require licenses and license fees from Indians operating businesses on their reservations.

If the Court affirms the Ninth Circuit on this point and rules that 18 U.S.C. 1161 did not grant states authority to exact licenses and fees from Indian liquor retailers on reservations, that would dispose of the licensing issues common to all three cases. However, if the Court rules against Eva Rehner on the common licensing issue, the Tulalip and Muckleshoot Tribes would expect to have a full opportunity to present evidence on

and argue the aspects of their cases which are not presented in Rehner and are not ripe for decision by this Court.

Unlike Rice v. Rehner, the two lawsuits from Washington State present a question of state licensing authority over tribal governments, not an individual tribal member. Even when Congress has expressly authorized state jurisdiction over reservation Indians, this Court has refused to infer an intent to extend state jurisdiction over tribal governments. Bryan v. Itasca County, Minnesota, 426 U.S. at 389. The intrusions upon tribal sovereignty which state jurisdiction over tribes qua tribes represents is of course an even more serious matter in light of the unique history of federal/tribal relationships. It is clearly not the sort of alteration in Indian country jurisdictional rela-

tionships that one would expect to occur without a careful discussion in the legislative history of its full ramifications, including, for example, the unique enforcement problems raised by the sovereign immunity of tribal governments. See Puyallup Tribe v. Washington Game Department, 433 U.S. 165, 170-172 (1977); Kennerly v. District Court, 400 U.S. 423, 427 (1971).

Furthermore, the Washington cases do not present simply a question of state licensing authority over reservation Indians. The precise issue in those cases is not whether the state can require a license and fees from reservation Indians under 18 U.S.C. 1161 as a precondition to selling liquor. The issue is whether a state, not otherwise "dry", can effectively preclude tribal regulation of liquor distribution by

absolutely prohibiting sales other than through state stores, or by state agents.

Unlike California, Washington State has a monopoly system of liquor distribution. Prior to its settlement with the Muckleshoot Tribe, Washington refused to allow anyone other than state liquor board employees, state agents, and persons employed in national parks or on military reservations, to sell liquor. The issue raised by the Tulalip and Muckleshoot cases is therefore a significantly different one. In 18 U.S.C. 1161, Congress clearly intended that tribes would be able to exercise their regulatory authority over liquor distribution in Indian country. United States v. Mazurie, supra. The question raised in Washington is whether any authority Congress granted states in 1161 extends so far as to allow a state to displace

tribal authority totally in order to protect its own liquor business monopoly. The potential abuses and dangers inherent in allowing a state's interest in its own economic ventures to dictate how tribal governmental activities on Indian reservations will be regulated are apparent. They have been noted previously in judicial decisions. See, e.g., Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 664 (9th Cir. 1975), cert. den. 429 U.S. 1038; Bryan v. Itasca County, 426 U.S. at 388 n. 14.

The record developed so far in the Tulalip and Muckleshoot cases suggests that Washington State has not been so concerned with state regulatory authority as with protecting a state business monopoly. See, e.g., State of Washington's Legislative Budget Committee's Performance Audit of the Liquor Control

Board, Rept. No. 78-13 (December 15, 1978) ["The major portion of available organization resources and management attention of (Liquor Control) Board personnel has been devoted to the merchandising of liquor for profit."][3]

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[3] See also, Joint Brief of Appellees, Ninth Circuit Nos. 79-4403, 4404, Addendum D-G. For example, on February 23, 1977 a board member reported to the State House Appropriations Committee, as follows:

> "Thus, you can see that the Liquor Control Board operates a very real business. It administers one of the largest wholesale and retail operations in the state, and, hence, must be looked upon as a business enterprise. . ."

A few days later, he added in a letter to the Washington House Appropriations Committee that:

> "We are concerned that failure to meet the public demand for more outlets may spawn a new initiative effort to turn the liquor business completely over to private enterprises at a loss of millions of dollars in liquor profits which help support state and local governments."

Finally, unlike Rice v. Rehner, the Washington cases raise questions regarding state taxing authority over liquor transactions in Indian country. The Ninth Circuit Court of Appeals did not decide whether Washington State could require the Tulalip and Muckleshoot Tribes to collect state taxes on sales to non-members, but remanded the tax issues to the district court, which had not previously considered these issues, for presentation of evidence, briefing and argument. Issues of state taxing authority have not been raised in the Rehner case. Therefore, the Washington district court may have the first opportunity to decide the issue, expressly left open by this Court in Washington v. Confederated Tribes, as to whether state tax collection requirements would be preempted by a tribe's exercise of

federally delegated power under 18 U.S.C. 1161. See, Washington v. Confederated Tribes, 447 U.S. 134, 156 (1980). See also, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 73 L. Ed. 2d 1174 (1982).[4]

In presenting evidence to the district court on this point, the Tulalip Tribes intend to show that Washington State has developed other less burdensome mechanisms for collecting liquor taxes from purchasers buying liquor at points beyond the state's jurisdiction and that imposing tax collection requirements on the tribe would unlawfully discriminate against it. Other examples of points

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[4] The State of Washington has abandoned any claim to taxation authority over liquor sales to tribal members in Indian country.

which will have to be litigated before the tax issues can be decided are whether the tribe is, in fact, simply "marketing" a state tax exemption, or is providing a conveniently located liquor distribution center to reservation residents, employees, and persons living in near proximity; and whether the tribe is entitled to a tax credit for the tribal taxes it collects.[5] The tribes also contend that, in light of the compre-

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[5] Not only does Washington State have a strong business interest in its monopoly system, it exacts some of the highest liquor taxes in the country. Although it distributes part of the revenue from these taxes to other local governments to be used in delivering their services, none of the state tax revenue or business profits are distributed to tribal governments. Rehner v. Rice, 628 F. 2d 1340, 1342-1343 (9th Cir. 1982). The Tulalip and Muckleshoot Tribes have claimed that, without an immunity or deduction from state taxes, they will be placed at a distinct competitive disadvantage in trying to raise tax revenue from liquor distribution to non-member residents

hensive federal scheme regarding liquor transactions with any Indian in Indian country, it is inappropriate to distinguish tribal members and non-member Indian residents of the reservation for purposes of state jurisdiction over liquor matters. Cf. Washington v. Confederated Colville Tribes, 447 U.S. at 161.

II. Congress Has Not Granted States Licensing Authority Over Reservation Indians Selling Liquor In Indian Country

While the Tulalip and Muckleshoot

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and employees on the reservation and in nearby areas. In effect, the state liquor stores would be able to market to those purchasers an exemption from tribal taxes, even though they may receive substantial services from the tribes. The tribes would consequently lose a significant portion of the revenue on which they depend in order to deliver important governmental services and finance their own liquor regulatory systems.

cases presented rather complex issues, the single issue presented by Rice v. Rehner is straightforward. The question is whether 18 U.S.C. 1161 constitutes Congressional authorization for state licensing authority over reservation Indians.

The rule is well-settled that, absent express statutory authorization to the contrary, Indian retailers in Indian country do not have to obtain state licenses or pay state fees before they can transact business. Moe v. Salish & Kootenai Tribes, 425 U.S. at 480-481. California makes the same arguments on the licensing issue that were made and rejected in Moe. As explained by Justice Rehnquist for the majority in Moe:

> In McClanahan this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the

reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes "which define the limits of state power." Reading them against the "backdrop" of the Indian sovereignty doctrine, the Court concluded "that Arizona ha(d) exceeded its lawful authority" by imposing the tax at issue.

In Mescalero, the companion case, the import of McClanahan was summarized:

> "(I)n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."

Aligning itself with the dissenting opinion below, the State first seeks to avoid McClanahan on two grounds: (a) the manner in which the Flathead Reservation has developed to its present state distinguishes it from the Navajo Reservation; (2) there does exist a federal statutory basis permitting Montana to tax.

* * *

> As to the second group, we note that the State does not challenge the District Court's overall conclusion that the treaty and statutes upon which the Tribe relies in asserting the lack of state taxing authority "are essentially the same as those involved in McClanahan." We agree, and it would serve no purpose to retrace our analysis in this respect in McClanahan.
>
> For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions. McClanahan, supra, Mescalero, Apache Tribe v. Jones.

425 U.S. at 475-477, 480-481 (citations and footnotes omitted). The Supreme Court also affirmed the lower court's determination that federal law precluded application to a reservation Indian of

both the state license and license fee requirements. Id. at 468, 483. See, Moe, 392 F. Supp. 1297, 1307 (D. Mont. 1975).

Thus, in Moe, a penumbra of general treaty language and statutory provisions was sufficient to preclude state business licensing authority over reservation Indians in accord with the principles of state jurisdiction articulated in the McClanahan and Mescalero cases. The preemption argument is even more compelling in regard to liquor transactions. Compared to cigarette regulation, the degree to which the federal government has undertaken control over liquor in Indian country is far more extensive. Long before California and Washington became states, the federal government had begun exercising its plenary jurisdiction over liquor transactions involving

Indians. Moreover, Eva Rehner's liquor business is not only governed by specific federal statutes on the subject of liquor, but she had been licensed under special, comprehensive, federal licensing laws applicable to Indian reservations. See, Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965).

California's reliance on inherent state police powers and the Twenty-first Amendment to extend its jurisdiction into Indian country is misplaced. See, e.g., Collins v. Yosemite Park and Curry Co., supra; United States v. New Mexico, supra. Other than matters involving only non-Indians, this Court has never ruled that inherent state authority extends to Indian reservations. In regard to authority over reservation Indians, the Court has always assumed its absence unless Congress has explicitly provided

otherwise. See, Bryan v. Itasca County, 426 U.S. at 376, n. 2; Kennerly v. District Court, 400 U.S. at 427; United States v. Kagama, 118 U.S. 375, 381-382 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). See also, Dick v. United States, 208 U.S. 340, 353-358 (1908).

California does not claim that 18 U.S.C. 1161 constitutes express Congressional authorization for state licensing jurisdiction over reservation Indians. Instead, it offers a meaningless distinction between the exercise of state "jurisdiction" and the exercise of state "control," as a means of avoiding the well-settled rule regarding extensions of state jurisdiction over reservation Indians which the Ninth Circuit Court of Appeals carefully applied. In addition, California argues that the Congressional

desire to end discrimination against reservation Indians, in the form of prohibition on reservations, and thereby reward Indians for service in World War II (see, "Eliminating Certain Discriminatory Legislation Against Indians In the United States," H. Rep. No. 775, 83d Cong., 1st Sess., July 15, 1953), was, in fact, a termination of their special status under federal law. But, the special status of Indians vis-a-vis state jurisdiction is not the sort of "discrmination" Congress was concerned about in 1161. As pointed out by Justice Rehnquist in Moe, federal statutes which treat Indians differently in regard to state jurisdiction are not to be viewed as a form of improper federal discrimination but as a recognition of the special political status of Indians and their unique relationship to the federal

government. As to the claim that immunity from state licensing laws constituted "discrimination," which Congress would not have intended, Justice Rehnquist wrote:

> "Literally every piece of legislation dealing with Indian tribes and reservations. . .single(s) out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.A., would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
>
> * * *
>
> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such lesgislative judgments will not be disturbed."

425 U.S. at 480. By seeking an end to prohibition in Indian country, Congress and tribes did not intend to effectuate

termination of the special federal relationship with tribes, in regard to liquor regulation.

Just as this Court refused to interpret Public Law 280 as a termination of the Indians' special status, so should it now refuse to accept California's argument that 18 U.S.C. 1161 was intended to subject reservation Indians to the full panoply of state liquor laws. See, Bryan v. Itasca County, 426 US. at 389-390; Menominee Tribe v. United States, 391 U.S. 404, 411 (1968). In fact, Felix Cohen, the well-known Indian law scholar, pointed out at the legislative hearings on the end of prohibition in Indian country that to condition it on a grant of state jurisdiction would not be a reward to the Indians but a dishonorable and unfair deal. See, Hearings before the Subcommittee on Indian

Affairs, House of Representatives, on H.R. 459, H.R. 3235, and H.R. 3624 (February 28 and 29, 1952). He said:

> . . .I am shocked at the tie up that the Indian Bureau now proposes between the drinking of liquor and the extension of State jurisdiction. . .

Id. at 45-46, 48. Felix Cohen urged that the end of prohibition on Indian reservations "should be done independently of any extension of state jurisdiction." Id. Accordingly, liquor provisions were removed from the Public Law 280 bill which was simultaneously being considered. California cannot now fairly contend that, under 1161, tribes can only open up their reservations to liquor traffic if they are willing to accept state liquor jurisdiction.

SUMMARY OF ARGUMENT AND CONCLUSION

The Ninth Circuit Court of Appeals

followed the applicable, prior case law in interpreting the scope of 18 U.S.C. §1161 and the Twenty-first Amendment in regard to Indian liquor sales on Indian reservations. The State of California cannot bootstrap itself into a position of licensing authority over Eva Rehner, with the attendant power to deny that which has been permitted under a federally supervised regulatory scheme and to impose insurmountable financial burdens upon her.[6] California's purported distinction between "control" and "jurisdiction" cannot mask the fact that Congress did not expressly provide for

---

[6] Just recently, this Court pointed out that the existence of federal supervision over a tribal regulatory system should substantially reduce opponents' fears of abuses and should make courts reluctant to encroach on tribal laws reviewed and approved through federal administrative processes. Merrion v. Jicarilla Tribe, 71 L. Ed 2d 21, 40-41 (1982).

state licensing authority over reservation Indians when it passed 18 U.S.C. §1161, but merely borrowed state substantive standards of conduct for purposes of future tribal/federal regulation. The concern which led to the adoption of the Twenty-first Amendment can be accommodated in this interpretation of 18 U.S.C. §1161. See, Rehner v. Rice, 678 F. 2d at 1348, n. 16.

The Ninth Circuit decision should accordingly be affirmed.

DATED this 24th day of January, 1983.

Respectfully Submitted,

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No. 82-401

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

EVA REISNER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION AS *AMICUS CURIAE*

This brief is submitted with the written consent of all parties.

The National Alcoholic Beverage Control Association (NABCA), by its attorney, files this brief as *amicus curiae* supporting the position of Petitioner and respectfully urges this Court to declare that 18 U.S.C. 1161 does not exclude states from exercising their Twenty-First

Amendment powers to regulate the distribution and sale of alcoholic beverages within Indian territory located within their boundaries.

INTEREST OF *AMICUS CURIAE*

The National Alcoholic Beverage Control Association is a Wyoming corporation which represents the 18 states and Montgomery County, MD, which currently exercise Twenty-First Amendment powers to control the distribution and sale of alcoholic beverages, including distilled spirits and, in many cases, wine and malt beverages, within their borders. These jurisdictions – Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming – are commonly referred to as "control" or "monopoly" states.

These jurisdictions possess the licensing authority utilized by the 32 so-called "open states," in that they provide for the operation and regulation of restaurants, taverns and other places where alcoholic beverages are served for on-premises consumption. Many of the NABCA member jurisdictions, like their "open" state counterparts, also license retail stores and other package stores and other locations where alcoholic beverages are sold for off-premises consumption.

What makes the NABCA member jurisdictions different from the 32 "open" states, however, is that the legislatures of these 18 states (and Montgomery County, MD, which was delegated control authority by the Maryland State Legislature) have decided that it is in the best interests of the citizens of their respective states to have the distribution and sale of alcoholic beverages more

tightly controlled than is possible through the licensing process used by "open" states.

Most of the NABCA member jurisdictions have Indian territory within their borders and thus their interest is great in the subject matter of the instant case. Indeed, one control state, Washington, was involved in litigation which was heard and decided by the United States Court of Appeals for the Ninth Circuit at the same time as the instant case. *Muckleshoot Indian Tribe v. State of Washington, et al., The Tulalip Tribes of Washington v. State of Washington, et al.*, 678 F.2d 1340 (1982).

The interest of NABCA is predicated upon the substantial and far-reaching consequences of any result in the instant case. The concern of the *amicus curiae* is that the Court, in formulating the principles to govern the particular dispute involved in the present case, should have the benefit of NABCA's views, which may not otherwise be presented in the arguments of the parties, in order to be aware of the ramifications of its decision herein on control state operations.

STATEMENT OF THE CASE

Petitioner, in its brief to this Court, has outlined the general principles appliable to the instant case. The United States Circuit Court of Appeals for the Ninth Circuit, in affirming in part and reversing in part decisions of the United States District Court for the Southern District of California and the United States District Court for the Western District of Washington, found that tribes exercise exclusive regulatory jurisdiction under 18 U.S.C. 1161 over liquor sales on the Indian reservations and that the Twenty-First Amendment does not expand states' jurisdictions over liquor sales on Indian reservations.

ARGUMENT

In the early days of this country, the Congress of the United States sought to exercise, with respect to the distribution and sale of alcoholic beverages, a differing set of standards for activity which took place within so-called Indian country than for similar actions which occurred in land outside of Indian country.

This discriminatory trestment extended for more than 150 years and was contained in a series of federal enactments which, among other things, prohibited the possession and sale of alcoholic beverages within Indian country. *See* 18 U.S.C. 1154, 1156, 3113, 3488, 3618. In 1953, however, Congress eliminated the paternalistic approach of the federal government and substituted in its place a system of two-part local option—involving the integration of state and tribal laws and ordinances—for the regulation of liquor sales.

The vehicle for this new system was the Act of August 15, 1953 (Public Law 83-277), which added 18 U.S.C. 1161, and which provided that the long-standing federal prohibitions against sale and distribution of alcoholic beverages within Indian country would only be removed under certain circumstances:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country, provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly aopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register.

18 U.S.C. 1161.

In its decision below, the United States Court of Appeals for the Ninth Circuit concluded that "section 1161 grants the states no jurisdiction to license or distribute liquor in Indian country." *Rehner v. Rice*, 678 F.2d 1340, at 1348 (1982).

NABCA believes, however, that the Court's opinion ignored the relevant legislative history of the statute in question, is internally inconsistent and, if followed, would lead, in the control states which NABCA represents, to the very kind of discriminatory treatment which Congress sought to eliminate through enactment of the section.

I.

THE COURT BELOW ERRED IN INTERPRETING THE LEGISLATIVE HISTORY OF 18 U.S.C. 1161

Public Law 83-277 began as legislation to change the previously-cited prohibitions on alcoholic beverage sales only with regard to the Indians of Arizona. See "A Bill To Terminate Federal Discrimination Against The Indians Of Arizona," H.R. 1055, 83rd Cong., 1st Sess. (1953). However, when this bill was reported by the House Committee on Interior and Insular Affairs, its original language had been stricken and new and expanded language, making the end of liquor prohibitions applicable to all Indian country, had been substituted. See H.R. Rep. No. 775, 83rd Cong., 1st Sess. (1953). This reported version of H.R. 1055 was subsequently modified slightly by the Senate Committee on Interior and Insular Affairs, and was passed by the full Senate. 99 Cong. Rec. 10800 *et seq.* (1953). Later, the House agreed to the Senate amendments, 99 Cong. Rec. 10928 (1953), and the bill was signed into law by the President.

On its face, the language of 18 U.S.C. 1161 eliminates the applicability of the federal liquor prohibition only if *two* criteria are met: the act or transaction occurring within Indian country must conform *both* with the laws of the state in which the Indian country is located *and* with a duly-adopted ordinance of the tribe having jurisdiction over the particular area of Indian country where the transaction occurs.

This plain language makes it clear, in NABCA's view, that Congress intended for states and Indian tribes to exercise concurrent jurisdiction over transactions occurring in Indian country. The statute does not confer exclusive jurisdiction on either the state or the Indian tribe, but mandates by its terms that laws of both must be complied with in order for the long-standing federal prohibition against liquor sales to be overridden. If the transaction complies with the ordinance of an Indian tribe, but not with the laws of the state in which the transaction occurs, the requirements of 18 U.S.C. 1161 have not been met, and the federal prohibition against liquor sales is continued.

This construction is supported by the report of the Senate Committee explaining the legislation. Stating that the bill would repeal Federal statutes relating to the introduction and possession of intoxicants in Indian country, the Committee said:

> [I]f this bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so

S. Rep. No. 722, 83rd Cong., 1st Sess., reprinted in (1953) U.S. Code Cong. & Ad. News 2399-2400.

Note that the Senate Committee is declaring that either a state *or* an Indian tribe can restrict sales of intoxicants

to Indians. The Congress did not declare, nor did it limit, the form of the restrictions which a state government could impose. Naturally, some of these restrictions can take the form of substantive standards, as the Ninth Circuit opinion states. But these restrictions can also take the form of regulatory action on licensing and distribution, which the Ninth Circuit suggests is somehow carved out of state authority by 18 U.S.C. 1161. NABCA believes that the Ninth Circuit's interpretation is erroneous and misreads the legislative history of the statute.

One of the most potent and effective sources of state restrictions on the activity of distributors and sellers of alcoholic beverages, whether Indian or non-Indian, is the licensing authority. With the authority to operate under a state-granted license, the seller of alcoholic beverages also assumes the restrictions placed on that authority; these restrictions can take the form of hours of operation, or of dispensing food along with alcoholic beverages, or of maintaining an orderly establishment.

Whatever the form of the restrictions, however, NABCA believes that Congressional intent is clear in showing that both states and Indian tribes have concurrent jurisdiction over all phases of regulation of transactions involving the sale and distribution of alcoholic beverages within Indian country and that there is no limitation on the type of restrictions which may be imposed by the states.

II.

THE NINTH CIRCUIT'S OPINION IS INTERNALLY INCONSISTENT

As indicated, the Ninth Circuit found that 18 U.S.C. 1161 granted the states no jurisdiction to license or distribute liquor in Indian country. *Rehner, supra,* at 1348. However, in two footnotes to its opinion, the Ninth Circuit indicates that the licensing and distribution activities which it condemned in the body of the opinion would be "unnecessary" if the state were to adopt substantive state standards and apply them directly to transactions in Indian country. *Rehner, supra,* footnotes 15 and 16.

NABCA believes that the Court is being inconsistent: on the one hand stating that the statute did not confer licensing and distribution authority on the states and on the other declaring that it does, in effect, have such authority, but must exercise it through "substantive restrictions."

It makes no sense, in NABCA's view, to declare that somehow a state's authority to license and distribute liquor in Indian country are not substantive standards and also to imply that a state could impose the same kind of restrictions as licensing and distribution if it did so through some undefined form of "substantive restrictions."

Statutes which provide for licensing of those who distribute alcoholic beverages and which provide for a state monopoly on the distribution of such beverages are "laws of a state" within the meaning of 18 U.S.C. 1161, it is contended, and the Ninth Circuit erred in indicating that these statutes were somehow to be accorded different treatment.

III.

IF FOLLOWED, THE NINTH CIRCUIT OPINION WOULD LEAD TO THE KIND OF DISCRIMINATION WHICH CONGRESS SOUGHT TO OUTLAW BY ENACTING 18 U.S.C. 1161

In reporting what was later to become 18 U.S.C. 1161, the Senate Committee on Interior and Insular Affairs stated its belief that "all legislation discriminating against our Indian citizens should be abolished." S. Rep. No. 722, *supra.*

However, if the opinion of the Ninth Circuit is allowed to stand, Indians will be granted a special status outside of the control of the alcoholic beverage laws of the state in which they reside, with the result that non-Indian citizens of the state will be the subject of discrimination.

For example, it is not clear under the Ninth Circuit's opinion whether a state could limit an Indian tribe to selling alcoholic beverages only to Indians, or only for consumption on Indian land. It is clear that state licensing regulations which prescribe hours of operation would not be permitted. The result would be that Indian tribes would be free to adopt whatever ordinances they wished for the distribution of alcoholic beverages, could permit the operation of 24-hour-per-day distributors, could sell liquor to non-Indians for consumption off Indian land, and could sell at a price that was substantially below that which prevailed for non-Indians. This latter situation would be particularly true in control states, where the right to sell and distribute alcoholic beverages rests solely with the state, which, in most cases, sets uniform prices for its citizens located in all parts of the state.

Operating pursuant to the authority granted in the Twenty-First Amendment, the 18 states which are

members of the National Alcoholic Beverage Control Association, have opted to control the distribution of alcoholic beverages by permitting little, if any, private enterprise to operate within their borders; what private enterprise that is allowed to operate must do so under tight state control, which may include a restriction that all alcoholic beverages dispensed must be purchased from the state.

The Ninth Circuit's opinion would give Indian tribes free reign to distribute alcoholic beverages in a manner which the tribes in their sole discretion determine; that determination could be under terms and conditions more favorable to Indian customers than to the customers of state-operated, or state-licensed establishments. Such a result would be discriminatory and should not be permitted.

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Ninth Circuit and declare that, pursuant to 18 U.S.C. 1161, states and tribes have concurrent jurisdiction over all phases of the distribution and sale of alcoholic beverages within Indian territory.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PALA BAND OF MISSION INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE PALA BAND OF MISSION INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted with the written consent of all the parties.

Interest of the Pala Band of Mission Indians

The Pala Band of Mission Indians is a federally-recognized Band of Indians, located on a federally-created Reservation in San Diego County, California. Approximately 350 members reside on the 11,565 acre Reservation. The Pala Band, as authorized by 18 U.S.C. § 1161, has chosen to allow the consumption and sale of alcoholic beverages on its reservation. Alcoholic beverages are regulated under an ordinance passed by the Band on or about August 13, 1959. That ordinance was certified by the Secretary of the Interior as required by § 1161, and was published in the Federal Register on or about April 16, 1960. The ordinance remains in effect.

Respondent Eva Rehner is a member of the Pala Band. The outcome of the case will directly affect the Band's control

over the licensing and regulation of liquor establishments run by tribal members on the Reservation. It will also affect the ability of Respondent to earn a living. The Tribe has a legitimate interest in the economic well-being of its members. This interest is particularly strong, where, as here, a member's ability to earn a living is intertwined with the Band's governmental authority.

Summary of Argument

Since the early days of this nation, Congress has completely ousted states from regulation of liquor transactions with Indian people. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876). Absent federal preemption, such regulation would have been a legitimate matter for inherent tribal sovereignty. Cf. Merrion v. Jicarilla Apache Tribe, ____ U.S. ____, 71 L.Ed.2d 21 (1982).

18 U.S.C. § 1161 granted Tribes the option to remove the federal prohibition against the introduction of liquor into Indian country and to regulate liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. United States v. Mazurie, 419 U.S. 544 (1975). Section 1161 granted no jurisdiction to states to impose state licensing or distribution requirements. Without specific federal authorization, state jurisdiction to license or regulate activity by Indians on the reservation does not exist. See, e.g. Bryan v. Itasca County, 426 U.S. 373, 377 (1976).

The Ninth Circuit's decision upholds the right of Indian tribes to license Reservation liquor sales, and to control those sales in conformity with state law. The Band, through its ordinance, has ex-

ercised that right. As a tribal government, it maintains licensing and primary enforcement authority. It is well-suited to do so, since its interests are direct and it has the administrative ability to carry out those functions. To equate tribal regulation with no regulation at all, as does the petitioner and its amici, denigrates tribal government and ignores the current Reservation situation.

Argument

Article I, § 8, cl 3 of the federal Constitution grants the Congress authority "To regulate commerce...with the Indian tribes." This power is broad in matters relating to alcohol in Indian country. United States v. Mazurie, 419 U.S. 544, 554-555 (1975); Perrin v. United States, 232 U.S. 478, 482 (1914). Congress has long occupied this field. See, e.g. United States v. Forty-Three Gallons of

Whiskey, 93 U.S. 188, 194 (1876). This comprehensive federal regulation itself precludes state jurisdiction; explicit preemption is not required. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 689 (1965).

Absent historical federal preemption, the subject matter involved in this case would have been an appropriate matter for the exercise of inherent tribal sovereignty Merrion v. Jicarilla Apache Tribe, supra. What this Court said in upholding tribal taxing power in that case is equally applicable here "...it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction..." Id. at 29. Since Congress removed the barrier to the exercise of tribal sovereignty and dele-

gated to Tribes part of its own power to regulate such matters, United States v. Mazurie, supra at 557, the Band and the United States have jointly occupied the field to the exclusion of the States. This Court has repeatedly ruled that, in the absence of a federal statute specifically authorizing the states to license or tax certain activity by Indians on the reservation, the state cannot exercise such power. White Mountain Apache Tribe v. Bracker, supra; Ramah Navajo School Board v. New Mexico Bureau of Revenue, ____ U.S. ____, 73 L.Ed.2d 1174 (1982); Bryan v. Itasca County, 426 U.S. 373, 376-377 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-481 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177-181 (1973). "The policy of leaving Indians free from state jurisdiction and control is deeply

rooted in the Nation's history." Rice v. Olsen, 324 U.S. 786, 789 (1945). In light of this policy, courts will not interpret a statute to grant States jurisdiction over Indians on reservations unless there is a clear and unambiguous expression of congressional intent to terminate Indian immunity from state law. Bryan v. Itasca County, supra, at 392-393. Doubtful expressions are resolved in favor of the Indians. Ibid.

18 U.S.C. § 1161 contains no expression of any intent to grant States jurisdiction over liquor transactions on Indian Reservations. The statute merely provides that federal criminal laws prohibiting the sale and possession of liquor in Indian country do not apply to any act or transaction that "is in conformity both with the laws of the State in which such act or transaction occurs

and with an ordinance duly adopted by the tribe having jurisdiction...." This provision was enacted to give individual tribes the option of retaining the existing federal prohibition against the introduction of liquor into "Indian country" or regulating liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. United States v. Mazurie, supra, at 547. The statute does not address the extension of state control over liquor transactions to Indian reservations. Instead, Section 1161 contemplates that state substantive standards concerning such matters as hours of sale or sale to minors will be incorporated by reference similar to incorporation of state law under the Assimilative Crimes Act. See 18 U.S.C. 13, 1152.

The statutory reference to state law defines an exemption from the federal prohibitions regarding the introduction of liquor into Indian country. If alcoholic beverages are sold on a reservation in violation of an applicable substantive state standard, the exemption provided in Section 1161 will not apply, and the offending parties will be subject to prosecution under one or more of the federal criminal provisions enumerated in Section 1161 (i.e. 18 U.S.C. 1154, 1156, 3113, 3488, 3618). See, e.g. United States v. Mazurie, supra. But Section 1161 evidences no intent to extend state jurisdiction or enforcement authority to the activities of Indians on the reservation.

The "in conformity with" language of § 1161 is much weaker than language found insufficient to subject the federal

government to state permit requirements in Hancock v. Train, 426 U.S. 167 (1976), and EPA v. State Water Resources Control Board, 426 U.S. 200 (1976). In those cases, this Court held that the Clean Air Amendments and the FWPCA Amendments do not authorize States to insist that federal air and water pollution control facilities obtain state operating permits, despite language requiring compliance by the federal government "to the same extent that any person is subject to such requirements." Citing principles of sovereignty as generally requiring non-interference by subordinate sovereigns the court stated: "We are unable to find in Section 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations

may not perform their activities unless a state official issues a permit." Id. at 179-180.

As the Court has recently observed, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980). There is no indication in the present case that Congress intended to allow states through the adoption of quota systems such as California's to effectively prevent Indian tribes from exercising the very option granted them by § 1161. The Court's more recent decision in California v. United States, 438 U.S. 645 (1978), acknowledged that state permit requirements govern the appropriation of water for federal water projects, but the Court reached that result against the unique backdrop of

federal deference to state water law. No such tradition of deference to the states exists where Indians and their activities on a reservation are concerned and especially in the context of liquor transactions on Indian Reservations. These matters have been historically under federal control.

Any interpretation of § 1161 allowing state licensing and regulatory jurisdiction would go directly against Congressional expression of support for tribal self-determination and economic self-sufficiency. See, e.g. Indian Reorganization Act, 25 U.S.C. § 461, Indian Self-Determination and Assistance Act, 25 U.S.C. § 450, et seq, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, et seq. See discussion in White Mountain Apache Tribe v. Bracker, supra, at 143, note 10. Section 1161 should be inter-

preted in light of this current strong federal policy. Bryan v. Itasca County, supra, at 386.

Pala, like most Indian tribes, suffers from high unemployment and generally lower income levels of its members. As a result, one of its major goals is to stimulate the Reservation economy, encourage jobs and income for tribal members, and remove wherever possible, economic barriers to reservation businesses, particularly those operated by tribal members. In recognition of those economic development needs, Pala has chosen not to impose a tribal fee for issuing liquor licenses to tribal members. Of course, if the purchase of a $55,000 state liquor license can be required of reservation sellers, those tribal goals will be directly frustrated. Certainly, most tribal members, including respondent,

cannot enter into the liquor business if they have to pay such a price to purchase a state liquor license. Economic self-sufficiency is vitally important to reservations, and has been strongly encouraged by the federal government. Allowing state licensing authority to be imposed on reservations, particularly when that licensing authority inherently involves a nearly insurmountable financial barrier to most tribal members, effectively frustrates both tribal government powers and authority and individual economic initiative. In addition, to the extent that such license fees operate as the equivalent of a tax on the privilege of selling liquor on the Reservation, they are clearly forbidden. White Mountain Apache Tribe v. Bracker, supra. This case presents an example of the mutual dislocation necessarily created

by dual regulatory schemes. Cf. Washington v. Confederated Tribes of Colville Indian Reservation, supra, at 158, 159.

Petitioner and amici argue adequate enforcement cannot be had by criminal prosecutions alone, but that the leverage of control over the license is needed. That leverage exists now, and the Band controls it, as is proper.

Conclusion

The decision of the Ninth Circuit Court of Appeals should be upheld.

Respectfully submitted,

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INTEREST OF AMICI

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk.

Amici Shoshone Tribe of the Wind River Indian Reservation, Standing Rock Sioux Tribe, and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, are all Indian Tribes recognized by the United States. The Shoshone Tribe (in conjunction with the Arapahoe Tribe)

and the Standing Rock Sioux Tribe permit sales of liquor on their reservations if in conformity with their liquor ordinances.[1]

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, to date have kept their Reservation "dry" and thus have never adopted an Ordinance authorizing the sale of liquor on the Reservation. Whether they may do so in the future is uncertain. Each of the *amici* share the critical concerns of the respondent that states not be allowed to interfere in tribal self-government by demanding that reservation Indians pay state taxes and submit to state regulatory control to do business on their own reservations, in the absence of a clear, intended, delegation of such power to the states by Congress or through the Constitution. Neither 18 U.S.C. 1161 nor the Twenty-first Amendment is such an expression.

INTRODUCTION

This case concerns California's attempt to compel an Indian woman, Eva Rehner—an enrolled member of the Pala Band of Mission Indians holding a federal trader's license—to pay a $6,000 license fee plus additional yearly fees in order to sell liquor from her general store situated on reservation trust land. Whether, under the state's liquor quota system, she would ever be awarded a license is uncertain. If none are available, under the state system she could be required to pay up to $60,000 to purchase a license on the open market.[2] The case does not

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[1] 37 Fed. Reg. 1253-1254 (January 27, 1972) (Shoshone and Arapahoe Ordinance No. 26, repealing Ordinance No. 398 adopted November 3, 1953); 47 Fed. Reg. 55522-55523 (December 10, 1982) (Standing Rock Sioux Ordinance No. 63, amending Ordinance No. 63 adopted May 9, 1974 (39 Fed. Reg. 35189-35190 (September 30, 1974)) (replacing resolution published December 22, 1953 (18 Fed. Reg. 8626)). *See United States v. Mazurie*, 419 U.S. 544, 547-548 (1975).

[2] California Bus. and Prof. Code §§ 23954.5, 23320(21); Respondent's Brief in Opposition to Petition for Writ of Certiorari at 31 n.4.

involve the regulation or taxation of non-Indian retailers. Nor does it involve any violation of state public policy as to when or to whom liquor may be sold in the state.

Because the incidence of the $6,000 liquor tax falls squarely on Mrs. Rehner, this case is unlike *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) where this Court upheld a tax which fell on non-Indian purchasers of cigarettes from Indian retailers. Because the state tax is on activities of a tribal member on a reservation, it ordinarily would be precluded by *McClanahan v. State Tax Commission*, 441 U.S. 164 (1973) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). This is because states generally lack jurisdiction to regulate or tax Indians on their reservations, and additionally because of specific federal preemption of the regulation of Indian trade. *See Ramah Navajo School Board, Inc. v. Bureau of Revenue*, No. 80-2162, slip op. at 4-6, 7-10 (U.S. July 2, 1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-149 (1980).

California seeks to overcome its lack of regulatory jurisdiction and its absence of any power to tax by relying on a single clause within 18 U.S.C. 1161, a criminal statute. That clause suspends federal sanctions on liquor sales within Indian country if the sale "is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

California also argues that the Twenty-first Amendment of the Constitution authorizes it to tax Indian retailers and prohibit sales of liquor by Indians on Indian reservations when made without a California license. California apparently concedes that unless one of these two sources gives it the power it seeks to exercise it would have no right to tax or regulate this activity. As

we show within, the Court of Appeals properly concluded that neither 18 U.S.C. 1161 nor the Twenty-first Amendment gives California the taxing and regulatory authority it seeks to exercise here.

ARGUMENT

I. 18 U.S.C. 1161 DOES NOT GRANT CALIFORNIA THE POWER TO REGULATE AND TAX THE PRIVILEGE OF AN INDIAN TO SELL LIQUOR UNDER TRIBAL AND FEDERAL AUTHORITY ON AN INDIAN RESERVATION.

A. Without an Expressed Unequivocal Delegation of Authority from Congress, California has no Right to Tax a Reservation Indian or to Require an Indian to Purchase a License to Sell Liquor on Reservation Trust Land.

1. *Indians on reservations ordinarily have the right to govern themselves free of state interference.*

This Court has held time and again that states lack jurisdiction over actions of reservation Indians on their reservations absent an express grant from Congress.[3] The Court has so held in the area of federally-licensed Indian traders,[4] taxes,[5] retailer's licenses,[6] general regulatory jurisdiction,[7] and criminal and civil jurisdiction.[8]

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[3] *Williams v. Lee*, 358 U.S. 217, 220-221 (1959).

[4] *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980).

[5] *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

[6] *Moe v. Confederated Salish and Kootenai Tribes*, 424 U.S. 463 (1976).

[7] *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[8] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The rationale has been the right of reservation Indians to govern themselves through their retained tribal sovereignty and, more recently, federal preemption. *See Ramah*, slip op. at 4-10.[9]

Public Law 280,[10] applicable in California, while granting the states considerable civil and criminal jurisdiction within Indian reservations, has consistently been held not to provide the states with taxation or regulatory authority over reservation Indians.[11]

2. *The United States has expressly preempted state taxation and regulation of Indian traders.*

In matters involving persons holding Indian trader's licenses, the lack of state jurisdiction has been particularly clear. Since 1790 [12] to the present [13] the Federal Government has comprehensively regulated reservation businesses by requiring that Indians (or non-Indians) wishing to sell, or "trade", on reservation lands secure licenses from a federal official subject to regulations promulgated by the Commissioner of Indian Affairs. These regulations, which specifically include sales of liquor, identify the terms and conditions under which Indian traders may operate on Indian reservations ranging from trader qualifications to business records to prices for ar-

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[9] *See also Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) *citing and quoting United States v. Mazurie*, 419 U.S. 544, 554 n.11, 557 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of County Commissioners v. Seber*, 318 U.S. 705, 715-716 (1943); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-476 (1976); *McClanahan v. State Tax Commission*, 411 U.S. 164, 167-173 (1973); and *Williams v. Lee*, 358 U.S. 217, 220-221 (1959).

[10] Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588, now partially codified at 18 U.S.C. 1162 and 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321, 1322 and 1324 (hereafter "Public Law 280").

[11] *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

[12] Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137.

[13] 25 U.S.C. 261-264; 18 U.S.C. 3113.

ticles sold.[14] In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965) this Court reviewed these comprehensive provisions and concluded that:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*

380 U.S. at 690 (emphasis added). The Court accordingly unanimously invalidated Arizona's efforts to further burden a licensed Indian trader by imposing a state gross sales or gross income tax. The instant license and annual fees demanded by California—essentially a privilege of doing business tax—are indistinguishable from the tax burdens struck down in *Warren Trading Post*. Thus, unless 18 U.S.C. 1161 justifies them, these provisions cannot apply to respondent. *McClanahan v. State Tax Commission*, 411 U.S. at 170-171.[15]

3. *The United States has expressly preempted state taxation and regulation of sales of liquor on Indian reservations.*

As with Indian traders, control of liquor on Indian reservations has consistently been a matter of exclusive federal control. Thus, Congress' occupation of the field

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[14] *See generally* 25 C.F.R. pt. 140 and 141 (1982), formerly designated 25 C.F.R. pt. 251 and 252 (1981).

[15] *See also Ramah Navajo School Board, Inc.*, slip op. at 7, 11 (following *Warren Trading Post* and holding Indian education statutes totally preemptive of state taxes falling on Indian school board constructing a reservation school); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165-166 (1980) (following *Warren Trading Post* and holding comprehensive Indian trader statutes totally preemptive of state taxes on unlicensed, nonresident traders selling on the reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 152-53 (1980) (following *Warren Trading Post* and holding comprehensive Indian timber statutes totally preemptive of state motor carrier license and use fuel taxes on non-Indian timber enterprise operating on the reservation).

of Indian liquor transactions provides a separate reason for holding California's licensing requirements inapplicable to reservation Indians in the absence of an interpretation of 18 U.S.C. 1161 as an express and unequivocal delegation of such authority to the states by Congress.

Beginning in 1802, when Congress enacted the first general measure to control the introduction and sale of liquor among Indians,[16] the Federal Government has comprehensively regulated every facet of the liquor trade with Indians in the Indian country. Since that time Congress has passed some two dozen statutes, all designed to bring any liquor trade with Indians under the close supervision of the Federal Government and the federal courts.[17]

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[16] Act of March 30, 1802, ch. 13, sec. 21, 2 Stat. 139, 146. This act authorized the President to take regulatory measures to control liquor among the Indians.

[17] *See e.g.*, Trade and Intercourse Act of May 6, 1822, ch. 58, sec. 2, 3 Stat. 682 (amending 1802 Act and prohibiting Indian traders from introducing liquor into Indian country, and authorizing search, seizure and forfeiture of seized liquor); Act of July 9, 1832, ch. 174, sec. 4, 4 Stat. 564 (generally prohibiting liquor in Indian country); Trade and Intercourse Act of June 30, 1834, ch. 161, secs. 20, 21 and 23, 4 Stat. 729, 732-733 (prohibiting liquor sales to Indians, distilleries, and introduction of liquor all into Indian country, authorizing seizure and forfeiture of goods, boats, packages and peltries, revocation of trader's licenses, destruction of liquor and distilleries in Indian country, civil penalties, and enforcement through military); Act of March 3, 1847, ch. 66, secs. 2-3, 9 Stat. 203-204 (amending sec. 20 of 1834 Act to add criminal penalties, make Indians "competent witnesses", and prohibit payment of annuities to intoxicated Indians); Act of March 27, 1854, ch. 26, sec. 3, 10 Stat. 269, 270 (excepting Indians in Indian country, or Indians prosecuted under tribal law, from federal sanctions); Act of February 13, 1862, ch. 24, 12 Stat. 338, 339 (amending sec. 20 of 1834 Act to equalize civil penalties; extending prohibitions to sales to Indian wards *outside* Indian country); Act of March 15, 1864, ch. 33, 13 Stat. 29 (amending sec. 20 of 1834 Act to equalize criminal penalties); Act of February 27, 1877, ch. 69, 19 Stat. 240,

Presently, in addition to 18 U.S.C. 1161, there are over a dozen provisions across three titles of the United States Code dealing with Indian liquor activities. These include

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244 (correcting 1873 codification of 1862 Act at R.S. § 2139 to remove the 'Indian in Indian country defendant' exception); Act of July 23, 1892, ch. 234, 27 Stat. 260 (amending R.S. § 2139 (1878) to enlarge enumeration of prohibited liquors, granting jurisdiction to district and circuit courts, and recognizing arrest warrants issued by state magistrates); Act of January 30, 1897, ch. 109, 29 Stat. 506 (reenacting law, further enlarging enumeration of prohibited liquors, extending prohibitions outside Indian country to sales to Indian allottees (in addition to Indian wards), defining Indian country, and reducing criminal penalties); Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1019 (authorizing use of special officers to prohibit Indian reservation liquor traffic); Act of August 24, 1912, ch. 388, sec. 1, 37 Stat. 518, 519 (excepting sacramental wine from liquor prohibition, and enlarging enforcement powers of special officers); Act of May 18, 1916, ch. 125, sec. 1, 39 Stat. 123, 124 (enlarging application of 1834, 1864 and 1873 distillery prohibition and search, seizure and forfeiture provisions codified at R.S. §§ 2140-2141, and making possession *prima facie* evidence of unlawful introduction); Act of March 2, 1917, ch. 146, secs. 1 and 17, 39 Stat. 969, 970, 983 (amending R.S. § 2140 to authorize seizure and forfeiture of automobiles or other conveyances used to introduce liquor in Indian country; amending definition of Indian country for liquor control purposes to include Osage Co., Oklahoma); Act of May 25, 1918, ch. 86, sec. 1, 40 Stat. 561, 563 (making Indian country liquor possession an independent offense punishable under 1892 and 1897 Acts); Act of June 30, 1919, ch. 4, sec. 1, 41 Stat. 3, 4 (reenacting Indian country liquor possession offense and extending Nez Perce liquor prohibition an additional ten years); Act of June 27, 1934, ch. 846, 48 Stat. 1245 (removing ceded, non-trust Indian lands outside Indian reservations from the reach of special Indian laws applicable in the Indian country); Act of June 15, 1938, ch. 435, 52 Stat. 696 (amending and reenacting R.S. § 2139, as amended in 1892 and 1897, adding new penalty provisions, authorizing prosecution by information, and repealing 1897 Act); Act of June 25, 1948, ch. 645, 62 Stat. 683, 757-760, 817-818, 820, 834 (amending and codifying Indian liquor prohibitions in Title 18, United States Code, at secs. 1151, 1154-1156, 3055, 3113, 3488; enlarging "Indian country" definition to include all reservation lands, all dependent Indian communities, and all allotments; extending liquor prohibitions to Indian school sites formerly in the

provisions prohibiting dispensing of intoxicating liquor to Indians in Indian country (18 U.S.C. 1154(a), as limited by 18 U.S.C. 1161), making exception for activities authorized in writing by the Department of the Army (18 U.S.C. 1154(b)), prohibiting dispensing liquor on any Indian school site formerly within Indian country (18 U.S.C. 1155), prohibiting possession of liquor in Indian country (18 U.S.C. 1156), authorizing special officers to suppress liquor traffic among the Indians (18 U.S.C. 3055), authorizing the search, seizure, and forfeiture, through the district courts, of conveyances used to introduce liquor into the Indian country, their disposition, and the destruction of seized liquor (18 U.S.C. 3113, 3618; 28 U.S.C. 1355), authorizing the mitigation of forfeitures for innocent owners of seized vehicles or aircraft (18 U.S.C. 3617, 3619), establishing possession of liquor in Indian country as *prima facie* evidence of unlawful introduction (18 U.S.C. 3488), prohibiting the maintenance of any distillery in the Indian country and providing for its destruction (25 U.S.C. 251), and authorizing the use of wine in the Indian country for sacramental purposes (25 U.S.C. 253).

Indian country); Act of May 24, 1949, ch. 139, secs. 25-28, 63 Stat. 89, 94 (amending liquor prohibitions in Indian country so as to not extend to fee-patented lands in non-Indian communities or to rights-of-way); Act of October 24, 1951, ch. 546, 65 Stat. 609 (enacting 18 U.S.C. 3619 to authorize mitigation of forfeiture for innocent owners of seized vehicles or aircraft); Act of October 31, 1951, ch. 655, sec. 30, 65 Stat. 710, 721-722 (technical amendment to 18 U.S.C. 3113 search and seizure provisions); Act of August 15, 1953, ch. 502, sec. 2, 67 Stat. 586 (limiting all Indian country prohibition laws to Indian country only, and suspending liquor prohibitions where activity authorized by tribal ordinance certified by the Secretary of the Interior and if in conformity with the laws of the state in which the activity occurs). For a history of the Indian liquor statutes, see F. Cohen, Handbook of Federal Indian Law at 352-357 (1942 ed.); Cohen's Handbook of Federal Indian Law at 305-308, 338-339 (1982 ed.).

In *United States v. Mazurie*, 419 U.S. 544 (1975) this Court reaffirmed not only Congress' exclusive power [18] to "regulate the introduction of alcoholic beverages into Indian country" (419 U.S. at 554), but also the Indian tribes' continuing authority over their reservations including the authority to permit or prohibit such sales. 419 U.S. at 557. This history of federal control—even more than the trader statutes at issue in *Warren Trading Post* and *Central Arizona Machinery*, the timber statutes at issue in *White Mountain Apache Tribe*, and the education statutes at issue in *Ramah*—reveals an active and total occupation of the field of Indian country liquor traffic by the Federal Government.

It is in light of this total lack of jurisdiction by the states over reservation Indian affairs, and this specific and total preemption of state taxation of Indian trading and liquor activities, that the clause of 18 U.S.C. 1161 seized upon by California must be read.[19] Only a clear, express command from Congress that tribal Indian liquor activities on a reservation are to be subject to regulation and taxation by state authorities can overcome the otherwise applicable federal preemption over reservation Indians. Section 1161 of Title 18 is not such an express consent to state taxation and regulation.

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[18] In *Mazurie* this Court referred to Congress' power over reservation liquor transactions under the Indian Commerce Clause as part and parcel of "Congress' exclusive constitutional authority to deal with Indian tribes." *Mazurie*, 419 U.S. at 554 n.11. *See also In re Heff*, 197 U.S. 488, 506 (1905) (holding that federal jurisdiction to regulate Indian liquor traffic was exclusive) *overruled on other grounds United States v. Nice*, 241 U.S. 591, 601 (1916); Felix S. Cohen's Handbook of Federal Indian Law at 354 (1982 ed.) ("The federal liquor laws applicable to Indian country apply to non-Indians and preempt state jurisdiction over the subject matter.")

[19] *Bryan*, 426 U.S. at 376 n.2, 392.

B. 18 U.S.C. 1161 is Not an Express Congressional Consent to State Taxation and Regulation of Sales of Liquor by Indians on Reservations.

State regulation of reservation Indians may only occur " 'by virtue of express authority conferred upon the State by an act of Congress.' " *McClanahan*, 411 U.S. at 170-171.[20] Section 1161 fails to meet that requirement.

Section 1161 provides that federal criminal sanctions against the introduction of liquor into Indian country are suspended as:

> to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

This court described this very act in *Warren Trading Post* not as granting jurisdiction to states but as "permitting application of state liquor law *standards* within an Indian reservation under certain conditions."[21] The Ninth Circuit, in the decision under review, agreed.[22] To interpret 18 U.S.C. 1161 as not only applying state standards—such as Sunday closings or prohibiting sales to minors—but as also authorizing state taxation and regulation goes far beyond the intent of Congress in enacting this "local option" measure solely to grant additional freedom to Indian tribes.

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[20] *See also Bryan*, 426 U.S. at 376-377 and n.2 (no state power "in the absence of congressional consent"); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (state regulation "is not permissible absent congressional consent"); *Williams v. Lee*, 358 U.S. 217, 220-221 (1959) (Congress must "expressly grant[]" the jurisdiction to states to "regulate the affairs of Indians on a reservation" "which *Worcester v. Georgia* had denied").

[21] *Warren Trading Post*, 380 U.S. at 687 n.3 (emphasis added).

[22] *Rehner v. Rice*, 678 F.2d 1340, 1344-1345 (9th Cir. 1982).

1. *The plain meaning of Section 1161 defeats any claim that Congress intended to confer state jurisdiction over Indian reservations.*

On its face, Section 1161 is not a jurisdictional grant, no less a grant of taxation authority to the states. It is an exemption from prosecution by the United States under limited circumstances designed to provide for local tribal option on liquor matters. Under the statute, otherwise criminally-prohibited liquor activities may be exempted from the federal prohibition laws if they are undertaken (1) in conformity "with the laws of the State in which such act or transaction occurs" and (2) in conformity "with an ordinance duly adopted by the tribe *having jurisdiction* over such area of Indian country" (emphasis added).

Although Section 1161 clearly intends—and was so held in *Mazurie*—to confer civil regulatory authority upon the tribe "having *jurisdiction*" over the reservation (over and above its inherent governmental authority), notably absent is a comparable reference in the statute to state *jurisdiction*. Thus, whereas a tribe may actually exercise its "jurisdiction" to pass an ordinance allowing liquor sales, the only statutory reference to state law is that tribally-sanctioned reservation liquor activities should be "in conformity with the laws of the State in which such act or transaction occurs." No provision is made for state enforcement, withdrawing federal enforcement over tribal liquor transactions, or eliminating the extensive federal statutes and regulations covering Indian liquor transactions. If, as noted in *Warren Trading Post* and by the Ninth Circuit below, Congress meant only to permit "application of state liquor law standards within an Indian reservation" where a tribe had previously authorized liquor transactions by a secretarially-approved tribal ordinance, Section 1161's language is precisely the language which was suited to that purpose.

A comparison with the Indian Major Crimes Act, 18 U.S.C. 1153, as amended, makes this interpretation clear. The phrase "in conformity with the laws of the State in which such act or transaction occurs" is virtually identical to the clause of the Indian Major Crimes Act to the very same effect, providing that certain federal crimes committed on Indian reservations and prosecuted in federal court "shall be defined and punished *in accordance with the laws of the State in which such offense was committed* * * *."[23] The Indian Major Crimes Act has never been read to grant states *jurisdiction* in Indian country, but only to require the use of state substantive laws in federal prosecutions. To imply that Congress, by use of the same language in 18 U.S.C. 1161, intended to grant to the states taxation and regulatory powers over liquor sales, much less sales by reservation Indians, is more than this language can bear.

2. *The legislative history of 18 U.S.C. 1161 shows that Congress did not intend to grant states powers to tax licensed Indian liquor traders.*

Principles of Indian sovereignty and lack of state fiscal or governmental responsibility over reservation Indian af-

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[23] Another example of the same legislative technique is 18 U.S.C. 13 (the Assimilative Crimes Act), making state standards of conduct—but not state criminal jurisdiction—applicable in federal enclaves including, by operation of 18 U.S.C. 1152 (the Indian Country Crimes Act), Indian reservations. Like the Indian Major Crimes Act, never has it been suggested that the Assimilative Crimes Act constituted a grant of state jurisdiction over federal enclaves. *See also Hancock v. Train*, 426 U.S. 167, 178-180, 198-199 (1976) (against an historical backdrop of no regulation by the states, the Clean Air Act's command that federal agencies "shall comply with * * * State * * * requirements" held not to require securance of state permits); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200 (1976) (reaching the same result regarding very similar language and history under the Federal Water Pollution Control Act). *Compare California v. United States*, 438 U.S. 645 (1978) (against an historical backdrop of federal deference to state water law, Bureau of Reclamation held required to secure a state permit).

fairs—and thus the states' lack of need to tax Indians because of the limited services provided by states to Indians—have long led this Court to strike down state attempts to tax reservation Indians. *See, e.g., Moe*, 425 U.S. at 476-477; *McClanahan*, 411 U.S. at 173 and n.12. If California prevails here, a federally- and tribally-authorized Indian liquor seller would have to pay $6,000 outright, plus additional yearly fees in order to obtain and retain a state license.[24] These features amount to nothing less than a direct tax on reservation Indians exacted for the privilege of selling liquor on the Reservation. Since Congress had "left the state[s] with no duties or responsibilities respecting the reservation Indians," *Warren Trading Post*, 380 U.S. at 691, it hardly makes sense to argue that Congress in 18 U.S.C. 1161 granted the states the privilege of levying tax measures on reservation Indians.[25]

To be sure, California, because of Public Law 280, does have some responsibilities within Indian reservations. But 18 U.S.C. 1161 is not applicable solely within Public Law 280 states. That Congress did not intend to subject reservation Indians to state taxation is especially compelling for *amici* Tribes as their surrounding states do not exercise any Public Law 280 criminal or civil jurisdiction whatsoever over reservation Indians. Even in Public Law 280 states like California, this Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976) laid to rest any possible argument that, through that statute, Congress had implicitly granted states taxing jurisdiction over reservation Indians.

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[24] See note 2, *supra*.

[25] *See, e.g., White Mountain Apache Tribe*, 448 U.S. at 150, 152 ("this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall"); *Central Machinery*, 448 U.S. at 163-164; *Ramah Navajo School Board*, slip op. at 11 ("the state does not seek to assess its tax in return for the governmental functions it provides to those [Indians] who must bear the burden of paying this tax").

Nowhere in the legislative history of 18 U.S.C. 1161 is there even a suggestion that Congress intended to confer on the states taxing power over reservation Indians. From its inception to its enactment H.R. 1055, the bill which ultimately became 18 U.S.C. 1161, was intended solely as a means of *benefitting* Indians who had served in the armed forces in World War II and who had returned to face discriminatory Indian prohibition laws. It was designed to benefit the Indians by removing these impediments and giving local control to the tribes.[26] The reference to state law came late in the legislative history of the bill and without any indication that Congress intended anything more than to accommodate state prohibition or closing laws. The bill's history, including archival research, is simply devoid of any evidence of a dual or secondary intent to depart from historic principles of Indian sovereignty and subject reservation Indians to state taxing jurisdiction and regulatory authority.

As originally introduced, H.R. 1055 was limited to Arizona and provided for conditionally suspending several federal laws which forbade the sale, purchase or possession by Indians of various items, including liquor, which could generally be sold, purchased or possessed by non-Indians either within or outside Indian country. Section 2 of the bill would have suspended these laws as to any act *outside* an Indian reservation if "in conformity with the laws of Arizona". Section 3 of the bill would have suspended these laws as to any act *within* an Indian reservation if "in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation." [27]

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[26] The intended benefit to Indian tribes was to be accomplished by eliminating "certain discriminatory legislation against Indians in the United States". Title to the Act of August 15, 1953, ch. 502, 67 Stat. 586.

[27] *See* H.R. 1055, reprinted in 99 Cong. Rec. 9959 (1953). Aside from 18 U.S.C. 1154 and 1156, the original bill also provided for

Ultimately, H.R. 1055 was reported out of the House Committee on Interior and Insular Affairs to read virtually in its present form.[28] In so doing the bill was extended to all states, narrowed to deal only with the Indian liquor laws, and amended so as to cover all applicable federal Indian liquor laws.[29] Former sections 2 and 3, however, were combined into section 2 (now 18 U.S.C. 1161). The 'conformity with state law' language was thus added to former section 3's suspension of criminal penalties for sales *within* an Indian reservation made in conformity with an ordinance of the tribe "having jurisdiction over the said reservation."

The House report is brief and fails to explain what the Committee members had in mind in adding the new requirement that on-reservation liquor transactions conform to state law.[30] The report simply restates the Committee's desire "that all legislation discriminating against

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suspending 18 U.S.C. 1157 (prohibiting sale to anyone of Indian livestock purchased for or issued by the Government), and 25 U.S.C. 195 (prohibiting sale to non-tribal members of Indian cattle purchased by the Government), 265 (prohibiting sale or pledge of hunting articles, husbandry implements, cooking utensils and clothing in Indian country) and 266 (prohibiting sale of arms in country occupied by hostile or uncivilized Indians).

[28] The Committee amendment as reprinted and adopted by the House appears at 99 Cong. Rec. 9959 (1953). A minor technical amendment made by the Senate led to the Act in its final form. *See* 99 Cong. Rec. 10800 (correcting the citation in Section 1 of H.R. 1055 as passed by the House) and 10928 (House concurring in same) (1953).

[29] The four other statutes originally carried in H.R. 1055 were carved out and dealt with in another bill, H.R. 3409. Three of these statutes, 25 U.S.C. 265, 266 and 195, were repealed outright in 1953. Act of August 15, 1953, ch. 506, secs. 1 and 2(b), 67 Stat. 590. The fourth, 18 U.S.C. 1157, was amended in 1953 but repealed four years later. Act of August 15, 1953, ch. 506, sec. 2(a), 67 Stat. 590; Act of July 10, 1957, 71 Stat. 277.

[30] H.R. Rep. No. 83-775, 83rd Cong. 1st sess. (1953) (Ser. 11666).

our Indian citizens may be abolished." H.R. Rep. No. 83-775 at 2.

Thus, no indication is given that the House Committee, well aware that reservation Indians were *not* subject to the jurisdiction of their surrounding states absent congressional provision otherwise,[31] intended by the inclusion of the 'state law' provision that reservation Indians should now be subject to state tax and regulatory jurisdiction. From what can be gleaned from the three-page report, the Committee included the phrase without consideration, on the recommendation of the Assistant Secretary of the Interior that the liquor laws should be inapplicable in Indian country "but only if such transactions are in conformity with the ordinances of the tribes concerned and are *not contrary to State law*." H.R. Rep. No. 83-775 at 3 (emphasis added). One can surmise that the Secretary did not want to create "wet" jurisdictions within "dry" states—such as Oklahoma then was—or have liquor sold on Sunday on reservations in states prohibiting such sales, but nothing explicit is said. Plainly, however, neither the Committee nor the Interior Department suggested that Indians, in addition to conforming their liquor-related conduct on an Indian reservation to state law, should also be required to pay state taxes and submit to the entire state regulatory licensing machinery over and above the secretarially-approved tribal machinery. It is clear from another letter of the Assistant Secretary—to the Bureau of the Budget recommending that the President sign the bill—that his understanding of the "state law" provision was to *preserve* "the principle

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[31] This same Congress and Committee considered and enacted Public Law 280, highly detailed and explicit legislation setting forth the procedures under which states might acquire certain criminal and civil jurisdiction over Indian reservations and their Indian residents.

of tribal self-government", albeit to be exercised "in a manner consistent with the public policy of the state." [32]

What has been said of the House evolution of Section 1161 is equally true for the Senate in which an identical companion bill, S. 485, had been introduced. *See* Sen. Rep. No. 83-722, 83rd Cong., 1st Sess. (1953) (Ser. 11661).[33] Thus, while the inclusion of the state law provision would insure against there being "wet" havens in

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[32] Letter of August 7, 1953 from Assistant Secretary of the Interior to the Director, Bureau of Budget, recommending passage of H.R. 1055. Portions of the letter are reproduced in *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39, 41-42 (1971). *See* discussion, *infra* at 22-24.

[33] The Senate Committee report appears to misconstrue the bill to mean that the federal prohibitions on sales to Indians anywhere, *as well as* on the introduction and possession of intoxicants in the Indian country, were *both* to be suspended only with tribal approval:

> H.R. 1055, as amended, would repeal Federal statutes relating to sales of intoxicants to Indians and the introduction and possession of intoxicants in Indian country, providing such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with ordinances duly adopted by tribes having jurisdiction over such area of Indian country.

S. Rep. No. 83-722 at 1. In fact, as presented to the Senate and as finally enacted, H.R. 1055 unconditionally did away with federal statutes prohibiting sales to Indians outside the Indian country. Moreover, and with this error in mind, the Committee report also observes that the option given to a tribe or a state was to *prohibit*—rather than to allow—liquor sales to Indians, or the introduction and possession of liquor into Indian country:

> In other words, if the bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales of intoxicants to Indians, they may do so.

Id. Even with these misunderstandings, it is significant that the Senate Committee made no note of what, if the state is correct, would otherwise have certainly been an historic change in the status of reservation Indians vis-a-vis their surrounding states.

Indian country within surrounding "dry" communities, the overriding scheme of the bill remained unchanged.

The absence of any reference whatsoever in the House or Senate committee hearings[34] or reports, to state jurisdiction to tax reservation Indians, together with the Secretary's letter as the source of the "state law" provision, is strong evidence that Congress did not intend the addition of the "state law" phrase to have the far-reaching consequences now urged by California.[35]

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[34] The House hearings, far from being as clear as California would wish them to be, fail to anywhere raise the spectre of unprecedented state taxing jurisdiction over reservation Indians. Indeed, the suggestion throughout is that regulatory matters are to be left to the Indian tribes themselves and a terrible and unjustified federal burden on reservation Indians lifted. *See* Unpublished Hearings Before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs held March 18, May 6, and June 2, 1953 (hereafter "House Hearings"), reproduced in Volume II of Petitioner's Brief on the Merits. In fact, the redraft of the bill offered by the Interior Department through Commissioner of Indian Affairs Myer—which apparently formed the basis for the Committee amendments—expressly recognized that conformity to state law was being required in areas where "the state lacks full criminal jurisdiction" (Pet. Br. A-18 - A-19), adding that, if amended, Section 2 would "provide for tribal ordinances in case they do not want liquor on the reservation areas, *where the state laws do not apply.*" *Id.* at A-21 (emphasis added). *See also* Pet. Br. A-26 (remarks of Commissioner Myer) ("We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided"); A-27 (remarks of Commissioner Myer) (the bill would "provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not otherwise covered by State law"—meaning not already prohibited in a "dry" state); A-68 - A-69 (remarks of Rep. Patten) (suggesting that prohibiting sales of liquor on school grounds as the type of substantive state law meant to be complied with).

[35] Whether the state system employs taxes, as in California, or state regulated monopoly sales, as in Montana and Washington, the objective is the same: to raise revenues for the state treasury. Like a tax, a monopoly system includes a "markup [which] can only be understood as an 'enforced contribution to provide for the

3. *Congress similarly never intended to grant states regulatory powers over reservation Indians.*

State policies on regulating liquor sales statewide are irrelevant—even detrimental—to the concerns of reservation Indians. For instance, in exercising their authority to regulate reservation liquor sales, a tribe may well determine that the reservation residents' welfare will be best served if only localized grocery store outlets, rather than a single central outlet, sell liquor. Such a scheme of local sales might be viewed as reducing the hazards of liquor-related highway injuries and deaths by minimizing the distance residents must travel to make their purchases on large, very rural reservations. If Congress intended that tribes hold control over the decisions to have or not have reservation liquor merchants, it must have intended that tribes also have the means of controlling those sales, including their location, number, etc.

It is the Indian tribes themselves who are most clearly concerned with the needs of their reservation people. State governments or regulatory bodies have little expertise on what is best for the reservation community. And yet, Indian tribal governmental decisions on what is best for the reservation community could be vetoed by state regulatory bodies if California's construction of Section 1161 is ac-

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support of government', the standard definition of a tax." *United States v. Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975) (adding "We see no difference between this markup and a sales tax * * *". 421 U.S. at 608). Monopoly liquor sale states have but a more effective way than outright taxes of reaching an identical objective by setting liquor sales at artificially high prices. Indeed, the fact that Mississippi employed a monopoly form of regulation as compared to California's tax and license scheme did not alter this Court's analysis or conclusion in ruling that federal enclaves could not be forced by a state to conduct liquor sales through the state's regulatory scheme. *Id. See also United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973); *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518, 538 (1938) (discussed *infra* at 24-26.)

cepted. Indeed, under the guise of regulation the state could deny licenses and thus prohibit all sales within Indian reservations in order to keep sales in the politically more powerful non-Indian communities. What was said in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) about state housing construction standards is no less applicable in the liquor context:

> [S]ubjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community.

532 F.2d at 664.

The legislative history of Section 1161 discussed above fails at any point to show that Congress wished states to control reservation Indian liquor sellers despite these consequences—consequences which, after all, lie at the root of why Congress has historically protected reservation Indians from surrounding communities and relieved the states of responsibilities over their affairs. Again, had Congress intended such a landmark change in the status of the Nation's reservation Indians, debates on the relative merits of such a course would be expected. In the absence of such discussion, an ambiguous provision inserted without Committee explanation should not be casually read to abolish historic Indian immunities against regulation by the very states who, after all, in many instances have been "often their deadliest enemies."[36]

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[36] *United States v. Kagama*, 118 U.S. 375, 384 (1886). *See also Washington v. Fishing Vessel Association*, 443 U.S. 658, 696 n.36 (1979).

4. 18 U.S.C. 1161 has consistently been construed administratively as not extending state regulatory jurisdiction over reservation Indians.

The interpretation provided Section 1161 by the Ninth Circuit is consistent with the opinion eleven years earlier of the chief legal officer of the Department of the Interior—the Department charged with administering the Federal Government's responsibilities on the Indian reservations. In a published opinion in 1971, the Solicitor ruled that Section 1161 did not require the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana to secure a license from the Montana Liquor Control Board once it had complied with a duly adopted, certified and published tribal ordinance. *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39 (1971). In that case, Montana's use of a license quota system, like California's present system, precluded the award of any license to the Montana Tribe by the Liquor Control Board. The Solicitor concluded:

> We do not believe Congress, in enacting this law [18 U.S.C. 1161], intended to make state liquor laws applicable to the tribe or tribal members on a reservation when a tribe wished to terminate Federal prohibition. If Congress had intended to impose state law here with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. sec. 1161, which it did not do. Rather, *we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.*

78 I.D. at 40 (emphasis added). The Solicitor went on to explain that in this way violations of state standards by an Indian on the Reservation would be subject to prosecution in the *federal* courts under 18 U.S.C. 1154,[37] but that

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[37] The tribal courts, too, would be available to prosecute Indian offenders who violated tribal law. Conversely, if a non-Indian

tribal members need not also secure state licenses and thus submit to the regulatory jurisdiction of the state: "If the State of Montana insists that a subordinate tribal entity or tribal member obtain a state license, this would be an unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them." 78 I.D. at 41.

In reaching his conclusion, the Solicitor, among other things, relied upon the August 7, 1953 letter from the Assistant Secretary of the Interior to the Director, Bureau of Budget, recommending passage of H.R. 1055, as amended to its present form.[38] In describing the bill and an Indian tribe's options under it, the Assistant Secretary observed that "the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the state." 78 I.D. at 42. As the Solicitor correctly concluded, this balance—the principle of maintaining tribal self-government while supporting the state's public policy—would be ill-served by requiring a tribe or its members to obtain a state license. *Id.* Indeed, the entire principle of tribal self-government would be undermined by such an imposition.[39]

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violated state standards on the Reservation, he would be subject to both state and federal prosecution. 78 I.D. at 41 (*citing United States v. McBratney*, 104 U.S. 621 (1881) and *Draper v. United States*, 164 U.S. 240 1896).)

[38] *See* pp. 17-18, *supra*.

[39] *See also*, Letter of January 22, 1976 from the Associate Solicitor, Division of Indian Affairs, to the Chief Counsel, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, holding a member of the Coeur d'Alene Indian Tribe entitled to a federal wholesaler's permit on the Coeur d'Alene Reservation despite Idaho's state monopoly on wholesaling. The Associate Solicitor reasoned:

> The rationale of the 1971 [Solicitor's] opinion was that 18 U.S.C. § 1161 intended to vest in the tribes the right to determine, in their exercise of self-government, what transac-

This interpretation of Section 1161 by the United States' chief legal officer for administration of Indian affairs is certainly entitled to "great respect". *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 (1976). This is particularly so where it also reflects the views of the Interior Department expressed both to Congress and to the Bureau of the Budget at the time Section 1161 was under consideration. This consistent interpretation by the Department of the Interior—not only responsible for administering the Federal Government's responsibility towards its Indian wards, but responsible for the very words of the statute now under consideration—should be conclusive.

In short, the Interior Department suggested an amendment which balanced tribal self-government with important state public policies. Congress accepted the suggestion without comment and made it law. California should not be allowed to come before this Court 30 years later to upset this balance and suggest a different motivation never evidenced anywhere.

II. THE TWENTY-FIRST AMENDMENT DID NOT CONFER ON THE STATES ANY POWERS TO TAX OR REGULATE RESERVATION INDIAN LIQUOR MATTERS.

To bolster its position California seeks to rely upon the Twenty-first Amendment as a grant of state power in

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tions involving liquor were to be allowed on their reservations and to require those transactions to conform to state standards. State licensing laws, under which tribes and tribal members could be prevented from obtaining licenses, would clearly undermine such tribal governmental authority, were they determined to be applicable on reservations.

* * * *

The right of the tribe to determine what liquor transactions are to be allowed on its reservation would be meaningless if a state could thwart the tribe's determination through its prohibition of private liquor sales. (Emphasis added)

A copy of the letter is appended to this brief at 1a-2a.

Indian country. But in so doing the state plainly disregards this Court's holdings on the inapplicability of the Amendment as a source of state power in areas of federal jurisdiction.

The Twenty-first Amendment merely states that the importation of liquor into a state is prohibited if in violation of state law. Significantly, it does not grant the state any jurisdiction to reach into areas where its jurisdictional powers do not otherwise extend. Thus, this Court concluded in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938):

> The lower court was of the opinion that though the Amendment may have increased "the state's power to deal with the problem . . ., it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the Twenty-first Amendment * * *. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the Twenty-first Amendment is not applicable.

304 U.S. at 538. Indeed, in *Collins*, despite an express agreement with the United States that California reserved its taxing power, this Court declined to read the reservation of jurisdiction broadly so as to also reach regulatory measures such as are embodied in state license fees. *Id.* at 532-533.

In *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 373-377 (1973), this Court struck down Mississippi's attempt to regulate liquor sales within military bases over which the United States exercised exclusive jurisdiction. After remand, the Court also struck down Mississippi's attempt to regulate liquor sales on military bases over which the United States only exercised concurrent jurisdiction with the state. *United States v. Tax Commission of Mississippi*, 421 U.S. 599, 613-614

(1975). The Court so ruled despite the fact that, unlike California, Mississippi otherwise had a monopoly on the sale of liquor within its borders, despite the fact that on the "exclusive" federal bases the state had, by agreement with the United States, the right to serve state civil and criminal process, and despite the fact that on the concurrent bases the state and federal government both had jurisdiction.[40] Even though the state's monopoly on liquor sales was effectively defeated as to sales made on the bases, this Court firmly rejected the notion that through use of a monopoly 'tax' scheme the state could overcome federal immunities from state taxes, regulation, and control.

Here, as in *Collins* and the *Mississippi* cases, the state has no jurisdiction over activities of Indians on their reservation except as expressly delegated by Congress. The Twenty-first Amendment cannot be used as a bootstrap for state jurisdiction where it does not otherwise exist, but only as a protection of existing jurisdiction. The *Mississippi* tax cases and *Collins* negative any implication that the Twenty-first Amendment permits a state to regulate Indian liquor sales on reservations whether by licenses, license fees, taxes, monopoly sales or otherwise.

---

[40] In the second *Mississippi* case this Court held that " 'Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion' that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction." 421 U.S. at 613-614.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

[SEAL] In Reply Refer To:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Jan. 22, 1976

Mr. Marvin J. Dessler
Chief Counsel
Bureau of Alcohol, Tobacco & Firearms
Department of the Treasury
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20226

Attention: Jack Paterson, Acting Assistant Chief Counsel (Technical)

Dear Mr. Dessler:

You have requested the opinion of this office as to whether 18 U.S.C. § 1161 prohibits the issuance of a basic (wholesaler's) permit by your bureau to Noel Campbell, a member of the Coeur d'Alene Indian Tribe, who proposes to operate a wholesale liquor business on the Coeur d'Alene Reservation in Idaho.

Mr. Campbell has been issued a tribal license to operate a wholesale liquor outlet pursuant to the provisions of the tribal tobacco and liquor ordinance.

Idaho law provides that liquor may be imported and sold only through state stores and distributors. 23 Idaho Code § 101 *et seq.* Therefore, except for beer, for which wholesale and retail licenses may be issued, private individuals are prohibited from wholesaling liquor in the State of Idaho. Licenses may be issued for the sale of distilled spirits by the drink only. 23 Idaho Code § 901.

Prior to 1953, federal law prohibited the sale of liquor in Indian country. The Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161, made the federal Indian liquor laws inapplicable to:

> ". . . any act or transaction within any area of Indian country *provided such act or transcation is in conformity both with the laws of the State in which such act or transcation occurs* and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." (Emphasis added.)

The question presented then is whether § 1161 makes the laws of Idaho operational on the Coeur d'Alene Reservation in such a way as to prohibit wholesaling of alcoholic beverages by tribal members.

On February 3, 1971, the Solicitor of this Department issued an opinion holding that § 1161 does not make state liquor laws applicable to Indians on Indian reservations, but, rather, requires that state liquor laws be used as the standard of measurement to define what conduct is lawful and unlawful under federal law. The opinion further held that a tribe or tribal member with a tribal liquor license need not obtain a state liquor license. A copy of this opinion is attached. As a matter of interest, the Justice Department, responding to our request for comments on the Solicitor's Opinion, has recently informed us that it does not intend to prosecute Indians who sell liquor in conformity with state laws and tribal regulations but without a state liquor license in the State of Montana. (The opinion dealt with a situation which arose in Montana.)

The rationale of the 1971 opinion was that 18 U.S.C. § 1161 intended to vest in the tribes the right to determine, in their exercise of self-government, what transactions involving liquor were to be allowed on their reservations and to require those transactions to conform to state

standards. State licensing laws, under which tribes and tribal members could be prevented from obtaining licenses, would clearly undermine such tribal governmental authority, were they determined to be applicable on reservations. The opinion stated that "the tribe, in the exercise of its inherent powers of sovereignty, can license a . . . tribal member to operate a liquor establishment on the reservation." *Cf. United States* v. *Mazurie*, 419 U.S. 544 (1975).

Your Regional Counsel does not disagree with the Solicitor's Opinion insofar as it holds that a tribe or tribal member need not obtain a state liquor license, but he evidently takes the position that where state law prohibits the private sale of liquor entirely, Indians on reservations within the state are also prohibited from making such sales.

It is our view, however, that the rationale of the 1971 opinion applies to this situation for the same reasons that it applies to the license situation. The right of the tribe to determine what liquor transactions are to be allowed on its reservation would be meaningless if a state could thwart the tribe's determination through its prohibition of private liquor sales. We can perceive no distinction between this situation and the one dealt with in the 1971 Solicitor's Opinion. In each instance the state has defined a class of persons who may operate liquor establishments, and that definition has operated to exclude Indians authorized to operate such establishments under tribal law. It seems to us to be immaterial that in the one instance the class defined by the state comprises a small group of private individuals licensed by the state while in the other it comprises only certain persons acting as agents of the state (and includes no private individuals whatever). The principle is the same: although the state's substantive standards governing liquor sales are applicable, the tribe—and not the state—has the sovereign authority to determine the class of persons eli-

gible to make such sales, and against whom those standards will apply.

Therefore, it is our view, consistent with the 1971 Solicitor's Opinion, that the Idaho law prohibiting private liquor wholesaling does not apply to members of the Coeur d'Alene Tribe on the reservation and that Noel Campbell may, under the authority of the tribal license issued to him, operate a wholesale liquor outlet on the Coeur d'Alene Reservation.

Sincerely,

/s/ Reid Peyton Chambers
REID PEYTON CHAMBERS
Associate Solicitor
Division of Indian Affairs

Enclosure

FILED

No. 82-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1982

BAXTER REICH, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA, PETITIONER

v.

EVA REHNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 18 U.S.C. 1161 grants the States authority to impose liquor licensing requirements and fees upon Indian tribal entities or tribal Indians acting under tribal authorization engaged in the business of selling liquor within an Indian reservation.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-401

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA, PETITIONER

v.

EVA REHNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE INTEREST OF THE UNITED STATES

The present case arises under 18 U.S.C. 1161, which exempts from an array of otherwise applicable federal criminal proscriptions attaching to the sale of liquor in Indian country any transaction carried out "in conformity both with the laws of the State in which [it] occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." The question presented is whether this federal statute grants State governments the power to require tribal Indians or tribal enterprises that intend to sell alcoholic beverages on trust lands within an Indian Reservation pursuant to tribal authorization to secure State licenses.

The United States has a special relationship with the Indian tribes generally. See *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 168-169 (1973). In addition, Eva Rehner, respondent in this case, is federally licensed as an Indian trader pursuant to 25 U.S.C. 261. The United States has an interest in protecting its authority to regulate trading on an Indian Reservation. See *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160, 163 (1980); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690 (1965).

The United States has consistently interpreted 18 U.S.C. 1161 as not granting States regulatory licensing power over tribal Indians. In 1971, the Solicitor of the Department of the Interior issued an opinion concerning the application of Montana's liquor licensing laws to a tribal Indian on Rocky Boy's Reservation, 78 Interior Dec. 39, concluding that Section 1161 does not grant the States licensing jurisdiction over tribal Indians doing business on Reservations. In 1977, the United States filed suit on behalf of the Mescalero Apache Tribe to prevent the State of New Mexico from imposing its liquor licensing requirements on the Inn of the Mountain Gods, a tribal resort on its Reservation. In that case the United States District Court for the District of New Mexico and the United States Court of Appeals for the Tenth Circuit held that 18 U.S.C. 1161 did not grant the State licensing jurisdiction over the tribal enterprise; this Court denied review. *United States* v. *New Mexico*, 590 F.2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979).[1] And, beginning in 1978, the United States participated as amicus curiae in the proceedings before the Ninth Circuit in the present case. Again, the government argued that Section 1161 does not grant States licensing jurisdiction over tribal Indians or tribal enterprises engaging in liquor transactions on Indian Reservations.

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[1] A similar result was reached in *Zaste* v. *North Dakota*, AL-75-29 (D.N.D. Jan. 31, 1977), an unreported case in which the United States did not participate.

Section 1161 is a statute of nationwide applicability affecting all Indian Reservations. These Reservations differ in location, size, tribal organization, and non-Indian presence. Many of the largest Reservations, such as the Navajo Reservation, which occupies an area in excess of 20,000 square miles, have highly developed tribal governments and extremely limited non-Indian presence within Reservation boundaries. Because Section 1161 is a nationwide statute, an interpretation of its terms binds all Reservations regardless of local circumstances. Petitioner's suggestion (Pet. Br. 80-81) that this Court decide this case in his favor based upon local circumstances not shown to have been within the contemplation of Congress is accordingly of particular concern to the United States.

A conclusion that 18 U.S.C. 1161 embodies a grant of authority to require State licensure of tribal Indians and tribal entities selling liquor under tribal authorization would significantly undermine federal policies favoring tribal self-determination and economic development of Indian Reservations. Such jurisdiction would grant to the States the power to select the tribal member or, indeed, tribal entity, who may engage in liquor transactions on Reservations, even for purposes of transactions involving only tribal members. Imposition of licensing requirements would also create a substantial, if not insurmountable, barrier to tribal economic development efforts based upon resorts and retail establishments, especially in sparsely populated areas.

The United States is not insensitive to the policy considerations advanced by the State. It is our view, however, that the relevant State interests do not require and cannot support the proposed interpretation of Section 1161 as a source of plenary State regulatory authority. Section 1161 itself requires the tribal ordinance permitting Reservation liquor transactions to be certified by the Secretary of the Interior. Legitimate State concerns respecting on-Reservation liquor sale activities may be ac-

commodated through the certification process and the cooperation of interested federal, State and tribal authorities.

STATEMENT

1. Eva Rehner is a member of the Pala Band of the Mission Indians. She operates a general store located on trust land within the Pala Reservation in San Diego County, California. The Pala Reservation was created by an Executive Order of the President of December 27, 1875, which set apart the land "for the permanent use and occupancy of the Mission Indians in Lower California." 1 C. Kappler, *Indian Affairs, Laws and Treaties* 820-821 (2d ed. 1904). Rehner is licensed by the Bureau of Indian Affairs of the United States Department of the Interior to trade on the Reservation under the provisions of the Act of Aug. 15, 1876, ch. 289, 25 U.S.C. 261.

Under longstanding federal law, introduction of liquor into Indian country is generally prohibited. 18 U.S.C. 1154. This prohibition does not apply, however, to "any act or transaction * * * in conformity both with the laws of the State in which [it] occurs and with an ordinance duly adopted by the tribe having jurisdiction * * *." 18 U.S.C. 1161. Pursuant to 18 U.S.C. 1161, the Pala Band adopted an ordinance permitting the "introduction, sale or possession of intoxicating beverages * * * within the Indian country under the jurisdiction of the Pala Band * * *." 25 Fed. Reg. 3343 (1960). This ordinance was approved by the Secretary of the Interior on April 11, 1960. *Id.*

In the mid-1970's Rehner determined to sell distilled spirits at her general store, but was informed by the California State Department of Alcoholic Beverage Control that she had first to obtain an off-sale general license from the Department. Off-sale general licenses make up one of the classes of liquor licenses issued by the State authorities, see Cal. Bus. & Prof. Code § 23000 *et seq.* (West repl. 1964 & Cum. Supp. 1982). An application for a new license in this category must be accompanied by a

fee of $6,000 which is deposited into the general fund of the State treasury. Bus. & Prof. Code § 23954.5 (West Cum. Supp. 1982). In addition, the State imposes an annual license fee of $350. Bus. & Prof. Code § 23320(21) (West Cum. Supp. 1982). The number of licenses that may be issued within a county is limited by a quota determined by reference to population. Bus. & Prof. Code § 23817. Off-sale general licenses are, however, transferable. Bus. & Prof. Code § 24070 (West Cum. Supp. 1982). Rehner alleges that such licenses were being sold on the open market for approximately $55,000 in 1977.

2. On February 10, 1977, Rehner filed suit in the United States District Court for the Southern District of California seeking a declaratory judgment that she was not required to obtain a California State liquor license to sell distilled spirits at her store and seeking an order directing the California authorities to inform wholesalers that sale of liquor to her was permissible. The district court granted petitioner's motion to dismiss, ruling that 18 U.S.C. 1161 required Rehner to obtain a State license to sell liquor at her store.

On appeal, the petitioner claimed that 18 U.S.C. 1161 granted the State jurisdiction to require State licensing of tribal Indians wishing to sell liquor on the Pala Reservation. He did not assert that the Twenty-First Amendment to the United States Constitution conferred such power on the States. This appeal was originally argued in the spring of 1979 before a three-judge panel of the Ninth Circuit. Before any opinion was rendered by that panel, two other cases presenting related questions involving tribes in the State of Washington, came before the court of appeals.[2] The three cases were then scheduled together for argument to an en banc panel of 11 members. See 9th Cir. R. 25.

The en banc court, with Judge Goodwin dissenting, reversed the judgment of the district court in this case.

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[2] The additional cases were: *"Muckleshoot Indian Tribe* v. *Washington*, No. 79-4403 (9th Cir.) and *Tulalip Tribe* v. *Washington*, No. 79-4404 (9th Cir.).

The court held that 18 U.S.C. 1161 did not confer licensing jurisdiction on the States (Pet. App. 8-A to 27-A). Upon consideration of the additional issues raised by the companion cases, the court of appeals remanded for consideration in light of *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), respecting the questions whether the State of Washington may tax tribal sales of liquor to non-tribal members and impose record-keeping requirements (Pet. App. 27-A to 30-A). See page 26 note 23, *infra*. The court of appeals also rejected Washington's contention that the Twenty-First Amendment to the United States Constitution granted the States regulatory jurisdiction over tribal liquor transactions on Indian Reservations (Pet. App. 30-A to 32-A).

INTRODUCTION AND SUMMARY OF ARGUMENT

It is useful to begin by specifying the issues this case does and *does not* present. First, unlike many of this Court's recent decisions, there is here no question respecting State taxation of Reservation activities of non-Indians. Compare *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Nor does this case involve general State regulation of non-Indian activities on Indian Reservations. Compare generally *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981); *Mescalero Apache Tribe* v. *New Mexico*, 630 F.2d 724 (10th Cir. 1980), vacated, 450 U.S. 1036 (1981), on remand, 677 F.2d 55 (10th Cir. 1982), cert. granted, No. 82-331 (Nov. 15, 1982).[3] Finally, there is no issue

[3] Some of the amici interpret the court of appeals' decision as holding that Indian Tribes have exclusive power to license non-Indians to engage in liquor transactions on reservations. See, e.g., Amicus Br. for Minnesota, et al. 10-13. While there is introductory language in the court of appeals' opinion (Pet. App. 1-A) that literally may be so read, the cases before the court did not present that

concerning State power to enforce its liquor laws and policies by means other than through a business privilege licensing requirement.[4]

Instead, the only question presented here is whether the State has authority to require a tribal Indian or a tribal entity to obtain a State liquor license for the privilege of engaging in liquor transactions within the confines of the tribal Reservation. Thus, this case returns the Court to an area of law last visited in 1976: the direct regulatory power of States over tribal Indian activities on their Reservations. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). In *Moe* the Court affirmed the decision of a three-judge district court holding that the State of Montana lacked authority to "require a member of [an Indian tribe] who sells cigarettes on the [tribal] Reservation to possess its cigarette dealer's license." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1317 (D. Mont. 1975), aff'd, 425 U.S. 463, 480-481 (1976). In *Bryan*, this Court held that the grant of general civil adjudicatory jurisdiction made to particular States in Section 4 of Public Law 280, 28 U.S.C. 1360, did not "confer upon the States general civil regulatory

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question and it is our view that the court of appeals properly left that question undecided. We note that this case involves a tribal Indian doing business on trust land within her Reservation and that *Tulalip* and *Muckleshoot* involved tribal liquor authorities exercising a monopoly on liquor sales within their Reservations. The question whether an Indian tribe can authorize a non-Indian to engage in Reservation liquor transactions without obtaining an otherwise required State license is not presented here.

[4] The court of appeals held that "so long as Mrs. Rehner complies with the certified tribal ordinance authorized by 18 U.S.C. 1161, she need not obtain a California license to sell liquor in Indian country" (Pet. App. 36-A). The court of appeals did not address respondent's demand that the petitioner be directed to inform wholesalers that liquor could properly be sold to her, and that aspect of the case appears to have been rendered moot by the enactment of legislation by the State. See Br. in Opp. 4-5, A-1.

powers, including taxation, over reservation Indians" (426 U.S. at 390).

The basic rule is that " 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' " *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-171 (1973) (quoting U.S. Dep't of the Interior, *Federal Indian Law* 845 (1958)); see *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). As a general matter, therefore, this Court's decisions establish that States lack regulatory jurisdiction to impose licensing requirements on tribal Indians or entities doing business on Reservations. In this particular case, moreover, the federal exclusion of State power to imposing a license requirement respecting Rehner's on-Reservation commercial activities is especially clear, for Rehner is *federally* licensed as an Indian trader pursuant to 25 U.S.C. 261—a scheme which leaves "no room * * * for state laws imposing additional burdens on traders." *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690 (1965). See also *Central Machinery Co.* v. *Arizona Tax Commission, supra*, 448 U.S. at 165-166.

The only question that this case properly presents in its present posture, is whether special provisions of federal law governing liquor transactions alter this allocation of regulatory power and grant the States regulatory jurisdiction they would not otherwise possess simply because liquor is involved. As shown below, 18 U.S.C. 1161 does not contain a jurisdictional grant to the States. The Twenty-First Amendment to the United States Constitution, while increasing the States' powers within their jurisdiction, does not extend the territorial scope of that jurisdiction. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938); *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973). Accordingly, neither of these provisions grants the States regulatory jurisdiction to license tribal Indians and entities to engage in liquor transactions within the confines of their Reservation.

ARGUMENT

I

18 U.S.C. 1161 DOES NOT GRANT THE STATES AUTHORITY TO REQUIRE A TRIBAL VENDOR OF LIQUOR TO OBTAIN A STATE LIQUOR LICENSE IN ORDER TO OPERATE ON A TRIBAL RESERVATION

1. Since 1834, federal law has prohibited liquor transactions involving tribal Indians. Act of June 30, 1834, ch. 161, 4 Stat. 732. As it stood in 1953, the federal prohibition, which forms a part of the criminal code, had several parts. First, the sale of liquor to tribal Indians anywhere in the United States was prohibited. 18 U.S.C. 1154(a).[5]

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[5] Specifically, the law prohibited sale to an Indian to "whom an allotment of land has been made" while legal title to the land remained in the United States, to an Indian "who is a ward of the Government" or to an Indian "over whom the Government * * * exercises guardianship." The federal liquor prohibition applicable outside Indian country accordingly did not establish a racial classification but, instead, was a manifestation of the special relationship between tribal Indians and the federal government. See *Morton* v. *Mancari*, 417 U.S. 535, 552-554 (1974).

In contrast to the federal prohibition, State laws which also prohibited sales of liquor to Indians appear to have established a true racial classification. Indeed, the case petitioner cites for the proposition that the States historically exercised authority to regulate Indian transactions involving liquor was based upon such a statute. *People* v. *Bray*, 105 Cal. 344, 38 P. 731 (1894). In that case a non-Indian was prosecuted under State law for selling liquor to an assimilated Indian, with no tribal affiliation, not living on any Reservation. The State court held that the State prohibition applied to Indians as a race. Whatever the validity of such a State law under modern standards of equal protection, this State precedent hardly serves as a basis for the assertion of State regulatory jurisdiction over a tribal Indian engaged in liquor transactions on a Reservation. Of all the State cases cited by petitioner (Pet. Br. 40), only one explicitly concerns State jurisdiction over on-Reservation activities, and that case involved the Reservation activities of non-Indians. *State* v. *Lindsey*, 133 Wash. 140, 233 P. 327 (1925). There the State prosecuted a non-Indian for manufacturing liquor within the exterior confines of a Yakima Reservation. The court found jurisdiction

Second, the introduction of liquor into Indian country was prohibited. *Ibid.* Third, the federal statutes prohibited possession of intoxicants in Indian country. 18 U.S.C. 1156.[6] When Congress set out in 1953 to eliminate these federal liquor restrictions which discriminated against Indians, it did not simply repeal these criminal statutes. Rather, Congress overlaid the existing prohibitions with 18 U.S.C. 1161, which is the subject of the dispute in this case, thereby establishing a division of jurisdictional authority congruent with the ordinary distribution of jurisdictional power respecting the activities of Indians.[7]

Outside Indian country, where tribal Indians are generally subject to nondiscriminatory State law, see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149

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based on this Court's ruling in *Draper* v. *United States*, 164 U.S. 240 (1896) and explicitly found that "no personal or property right of an Indian" was involved in the case. 233 P. at 328. The remaining cases cited by petitioner involved laws similar to that considered in *People* v. *Bray*, *supra*, prohibiting sale to Indians on the basis of race.

The cases cited by petitioner rest upon statutes enacted before repeal in 1953 of the absolute federal ban on liquor sale and possession in Indian country, and therefore could in no event lend support to petitioner's thesis (Pet. Br. 38-40) that Congress was aware of, and acquiesced in, State exercise of regulatory authority over on-Reservation liquor trade. Because federal law and the State laws in question prohibited sale of liquor to tribal Indians in Indian country at that time, no question as to State authority to require licensure or to regulate the terms and conditions of sale could have arisen.

[6] In 1949, the definition of Indian country was modified for the purposes of the federal liquor prohibitions. The general definition, set out at 18 U.S.C. 1151, was amended to exclude "fee-patented lands in non-Indian communities or rights of way through Indian reservations." 18 U.S.C. 1154(c) and 1156. In *United States* v. *Mazurie*, 419 U.S. 544 (1975), the Court considered the application of the term "non-Indian communities."

[7] Another federal liquor prohibition, not affected by enactment of 18 U.S.C. 1161, outlaws intoxicants at Indian schools "in the former Indian Country." 18 U.S.C. 1155. That statute is not involved in this case.

(1973), Congress in Section 1161 simply made the federal liquor prohibitions inapplicable.[8] Within Indian country, however, where tribes exercise inherent tribal sovereignty, the criminal prohibitions on liquor sale and possession were lifted to the extent that particular transactions were undertaken "in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register" 18 U.S.C. 1161. But this conditional exemption from the otherwise applicable federal criminal sanctions was in favor of the Tribes, not the State. As the Court explained in *United States* v. *Mazurie*, 419 U.S. 544, 547 (1975), Section 1161 is

> local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian Country, so long as state law was not violated.[9]

2. a. The court of appeals correctly concluded that 18 U.S.C. 1161 does not *grant* the States authority to require purveyors of liquor under tribal authority to obtain a State license as a condition of operation. On its face, as the

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[8] The pertinent portion of 18 U.S.C. 1161 provides that the provisions of 18 U.S.C. 1154 and 1156 "shall not apply within any area that is not Indian country."

[9] In *Mazurie*, the Court also concluded that the delegation of authority to the tribes in 18 U.S.C. 1161 was constitutional in the context of tribal regulation of a non-Indian doing business on the Reservation. 419 U.S. at 557. The Court also noted that tribes have some measure of inherent authority within the Reservation over non-Indians who do business with tribal members or who affect the internal or social relations of tribal life. *Ibid.* See also *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981).

The tribal ordinance of the Wind River Reservation at issue in *Mazurie*, *supra*, required non-Indians to obtain both State and tribal liquor licenses. In contrast, tribal members were required only to obtain a tribal license. 37 Fed. Reg. 1253-1254 (1971).

court of appeals observed (Pet. App. 13-A), Section 1161 is not "a jurisdictional grant to anyone; it simply provides for the inapplicability of certain federal criminal statutes under specified conditions." It is significant, moreover, that Congress enacted Section 1161 as part of the federal penal code, Title 18. Here, as in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 384 n.11 (addressing civil jurisdiction under Public Law 280), it is plain that "[Section 1161] would be expected to be codified in Title 25, governing Indian affairs if * * * state regulatory power over Indian reservations were being granted." [10] The most that can be said is that Section 1161 reflects Congress' intention that the law of the State in which an on-Reservation liquor transaction occurs provide substantive limits upon conduct that may be undertaken under the jurisdiction of the tribe without incurring liability under the federal criminal law.[11]

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[10] In *Bryan* v. *Itasca County*, the Court also considered the title of the legislation and of the codified enactment to be significant indicators of congressional intent. 426 U.S. at 384 n.11. Here, of course, the introductory title of the leigslation, "An Act to eliminate certain discriminatory legislation against Indians in the United States," Public Law No. 277, 67 Stat. 586, contains not the slightest suggestion that tribal authority over on-Reservation activities was to be subjected to State jurisdiction. Similarly the title prescribed by Congress for Section 1161 itself, "Application of Indian Liquor Laws" contains no such suggestion.

[11] As to the tribes themselves, there was no need for Section 1161 actually to bestow regulatory authority respecting reservation liquor transactions—at least when conducted by tribal members or entities —for the tribes possess important "attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. It was thus sufficient as to the tribes that Section 1161 removed the pre-existing federal law impediment to exercise of tribal authority. Of course, in *Mazurie*, 419 U.S. at 547, 556-558, the Court recognized that Section 1161 did bestow upon the tribes authority to regulate liquor transactions by non-Indians in Indian country, reserving the question whether, as to such non-Indians, the inherent authority of the tribe would be a sufficient basis for the exercise of tribal authority. Cf. *Merrion* v. *Jicarilla*

b. Nor can it be said that Section 1161 *recognizes* State authority to impose licensing requirements upon tribal members selling liquor under tribal authority (compare page 12 note 11, *supra*). The longstanding policy of the United States to leave tribal Indians free from State jurisdiction and control has been recognized by this Court. *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168. In deference to this policy, the Court has required a direct and unambiguous indication of congressional intent to depart therefrom in considering claims that a particular statute grants the States jurisdiction over the Reservation activities of tribal Indians. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Doubtful expressions are resolved against claims of State authority. *Ibid.* In light of these cannons of construction, petitioner's claim that Section 1161 recognizes State licensing authority over Reservation vendors of liquor is unsound.

First, as the court of appeals observed (Pet. App. 11-A to 15-A), insofar as Section 1161 recognizes the authority of the States to legislate respecting the sale of liquor in Indian country, that authority is not identical to that of the tribes, and does not extend to regulation, administration of State law standards, or to licensing. As to the tribes, the authority recognized (see page 12 note 11, *supra*) is described by the statute in terms of exercise of "jurisdiction," whereas the authority of the State is merely described as the application of subsisting "laws"—norms of conduct. The absence of any parallel reference to State jurisdiction is a telling indication that Congress did not expect or intend the States actually to administer a regulatory scheme affecting Reservation liquor transactions occurring under the "jurisdiction" of the tribe.

Congress' understanding that State and tribal authority were not congruent is also reflected in the statutory de-

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Apache Tribe, 455 U.S. 130, 140-141, 147 (1982). As we explain in the ensuing text, neither the language nor the legislative history of Section 1161 suggests that an identical grant of authority was made to the States.

scriptions of the instruments by which a State and a tribe were respectively to exercise their authority. The tribe is to enact a specific ordinance for this purpose, which must be specially certified by the Secretary. Enactment of such ordinances was, of course, necessary because under the pre-existing statutory scheme there was no reason for the tribes to have legislated on this subject. Congress appears to have intended that such newly-enacted ordinances form the plenary authority under which Reservation liquor transactions might take place. By contrast, Congress contemplated that the State's authority be given effect through the general requirement of conformity with "the laws of the State." It thus appears that Congress did not expect that the States would undertake any special legislation or any administration of its liquor laws to apply them to Indian Reservation transactions; rather, it was sufficient that the pre-existing body of State law was available to provide the substantive standards governing sale of alcoholic beverages.

Second, the legislative history of Section 1161 provides no support for petitioner's contention that Congress intended to subject reservation liquor sales under tribal authority to the licensing authority of the States. A predecessor to Section 1161 was considered during the 82d Congress in 1952. The original proposal of the Department of the Interior was to tie the repeal of federal criminal prohibitions on sale of liquor to Indians to a broader proposal (a forerunner of Public Law 280), also then pending, to transfer criminal jurisdiction to the States. See *State Legal Jurisdiction In Indian Country: Hearings on H.R. 459, H.R. 3235 and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong., 2d Sess. 29-34 (1952). In the next Congress, that course was abandoned and the two proposals were separated. As ultimately enacted the liquor provision, 18 U.S.C. 1161, was designed to apply nationwide to all Indian Reservations; the statute transferring criminal jurisdiction to the States, Public

Law 280, 18 U.S.C. 1162, on the other hand was made applicable only to designated Reservations and States.

As originally introduced in the 83d Congress, H.R. 1055, 1st Sess. (1953) was applicable only within the State of Arizona. See *Hearings on H.R. 1055 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (March 18, 1953), reproduced at Pet. Br. App. A-4 to A-7, A-8.[12] In its original form the bill provided simply that the federal Indian liquor laws "shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation" (Pet. Br. App. A-6). Commissioner of Indian Affairs Dillon S. Myer testified at the hearings in support of an amended version of H.R. 1055 that in essential respects resembles Section 1161 as enacted. He explained that the sole purpose of the proposal was to eliminate federal legislation that discriminated against Indians (Pet. Br. App. A-15, A-17). As proposed by Commissioner Myer, the bill rendered the federal liquor prohibitions entirely inapplicable outside Indian country, as well as to

> any * * * transaction within any area of Indian country over which the State lacks full criminal jurisdiction that is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register.

Pet. Br. App. A-18 to A-19. Commissioner Myer thus made explicit the general understanding that the State lacked jurisdiction upon Indian Reservations, and that rather than granting such jurisdiction to the States, the preferred ap-

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[12] So far as we are aware these hearings are not officially published. They have been reproduced in the appendix to petitioner's brief on the merits. "Pet. Br. App." denotes that appendix.

proach was to mandate conformity with the substantive requirements of State law as a condition of exemption from federal criminal sanctions. He explained (Pet. Br. App. A-21; emphasis added):

> What [the proposed statute] does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, *and provide for tribal ordinances in case they do not want liquor on reservation areas, where state laws do not apply.*[13]

The bill as reported favorably by the House Committee substantially conformed to the recommendations of the Department of the Interior. See H.R. Rep. No. 775, 83d Cong., 1st Sess. 2-3 (1953); *Hearings on H.R. 1055 Before the Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. (June 2, 1953), reproduced at Pet. Br. App. A-70. The House Report makes no mention whatever of imposition of any grant of State jurisdiction over activities on Indian Reservations or State authority to require licensure. The Report includes the favorable Report of the Interior Department upon the bill reflecting that liquor transactions upon Reservations would be exempted from special federal criminal sanctions if made "in conformity with the ordinances of the tribes con-

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[13] Read in context, the additional remarks of Commissioner Myer stressed by petitioner (Br. 34-35) are not to the contrary. Commissioner Myer's statement that "we certainly do not intend to try to revise state laws regarding Indians or anyone else" (Pet. Br. App. A-26) was made in response to questions about the authority of the States to apply their laws to govern off-Reservation sales of liquor to Indians.

Petitioner's reliance on Congressman Patten's statement (Pet. Br. App. A-69) that "the Indians would still have to comply with State law in every regard * * *" is misplaced. That remark was made in the context of discussion of a possible repeal of 18 U.S.C. 1155, an act that prohibits liquor on lands embracing Indian schools in "former Indian Country." See page 10 note 7, *supra*. Former Indian Country is by definition outside any Reservation. Accordingly, absent contrary provisions federal law, tribal Indians are subject TO state jurisdiction at such locations. See *Mescalero Apache Tribe* v. *Jones*, *supra*.

cerned and * * * *not contrary to State law.*" H.R. Rep. No. 775, *supra*, at 3 (emphasis added). The bill passed the House swiftly with little no debate, and was reported favorably by the Senate Committee without further hearings. Although the Senate Report indicated that actual sales could be restricted under substantive state law, S. Rep. No. 722, 83d Cong., 1st Sess. 1 (1953), there is no suggestion that State licensure could be required. And the Senate Report, like the House Report, reflects the Interior Department's view that the legislation would permit sales in Indian country that are "in conformity with the ordinances of the tribes concerned and are not contrary to state law." S. Rep. No. 722, *supra*, at 2. This formulation makes clear that Congress had no intent to subject tribal sales to State regulatory or administrative jurisdiction or to require State licenses, but only to invoke the substantive corpus of State law as a set of standards limiting tribal discretion in regulating liquor sales.[14]

Here, as in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381, the complete absence of any indication in the legislative history of any intention to effect "a sweeping change in the status of tribal government" by "confer[ring] upon the States an authority to [administer regulations affecting] Indians or Indian property on reservations" is telling evidence that no such change was intended.

3. The State argues (Br. 18-26), however, that statutory recognition of State authority to adopt general laws affecting the sale of liquor that are binding with respect to Reservation sales cannot logically be confined to those State laws that establish substantive standards for sale, and must accordingly extend to State licensing laws. This contention is flawed for several reasons.

First, as we have explained (pages 13-17), the language and legislative history of Section 1161 both suggest that

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[14] Most importantly, of course, the State prohibition laws were thus given effect, as were State standards governing the actual sale of liquor (as opposed to the seller)—for instance prohibitions on sales to minors, and restrictions upon hours of sale.

Congress withheld from the States any grant of jurisdiction to actually apply their laws to on-Reservation sales under tribal authority. Moreover, especially because Section 1161 was not on its face a direct grant of authority to any party, but only a limitation upon the reach of the federal criminal law, the natural reading of the phrase "in conformity with the laws of the State" is that only the substantive standards of those laws are to apply and not the licensing requirements of State law. In this context it was unnecessary for Congress to expressly negate any inference that State licensing authority was recognized; it is sufficient, that Congress nowhere conferred such authority. By contrast, recognition of State authority to adopt substantive standards to be applied through the federal criminal law did not entail any separate grant of authority (see page 22, *infra*). Petitioner's contention is thus contrary to the plain language of Section 1161.

Moreover, because application of State licensing requirements to tribal sellers of liquor on a Reservation pursuant to tribal authority is a markedly greater intrusion upon traditional notions of tribal sovereignty than the application of the substantive requirements of State law, any ambiguity in the statutory text should be resolved against recognition of State licensing authority. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381, 390.

Hancock v. *Train*, 426 U.S. 167 (1976), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), are instructive in this regard. In those cases, decided at the same Term as *Bryan*, this Court concluded that language in environmental protection statutes expressly requiring federal facilities to comply with State antipollution requirements did not subject such facilities to State permit or licensing provisions.[15] Because a clear

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[15] In *Hancock* the Court considered the effect of Section 118 of the Clean Air Act, which then provided (42 U.S.C. 1857f):

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government

and unambiguous congressional mandate is needed to subject federal installations to regulation by States, this Court concluded in each case that the statutory direction to comply with State requirements did not subject federal facilities to State permitting authority. So, too, in this case, the analogous congressional reference to acts or transactions "in conformity with" State law should not be read to subject tribal Indians to State licensing power.[16] Instead, 18 U.S.C. 1161 should be read, as the statutes involved in *Hancock* and *EPA* were read, to require, as a matter of federal law, that liquor sale transactions be made in accordance with State substantive

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(1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

In *EPA* v. *State Water Resources Control Board* the Court considered Section 313 of the Federal Water Pollution Control Act Amendments of 1972, the language of which was then essentially identical to the analogous provision of the Clean Air Act. 33 U.S.C. 1323.

We note that Congress subsequently accepted the invitations extended in *Hancock* (426 U.S. at 198) and *State Water Resources Control Board* (426 U.S. at 227-228) by amending the federal air and water pollution statutes to subject federal facilities to State permitting requirements. See 33 U.S.C. (Supp. V) 1323; 42 U.S.C. (Supp. IV) 7418. Congress thus validated the Court's conclusion (*Hancock, supra*, 426 U.S. at 198) that it would speak unequivocally if it wished to subject the United States to State permitting requirements. In light of this Court's decision in *Bryan* v. *Itasca County, supra*, Congress may equally be held to the requirement of plain speaking in determining whether the States have been authorized to enforce their licensing requirements upon Indian Reservations.

[16] Because, unlike the statutory provisions considered in *Hancock* and *State Water Resources Control Board* (see note 15, *supra*), Section 1161 contains no affirmative requirement of conformity with State law, but merely sets up such conformity as a condition for exemption from federal criminal proscriptions, the absence from Section 1161 of any grant of authority to the States to impose license requirements is especially clear.

standards but not subject to State licensing or permitting authority.[17]

b. As the court of appeals observed (Pet. App. 15-A to 21-A), the absence from Section 1161 of any grant of authority to the States to enforce their licensing requirements against Reservation liquor vendors operating under tribal authority is highlighted by a comparison of that statute with other federal laws that do accord the States varying measures of jurisdiction over the Reservation affairs of tribal Indians. On the one hand, Section 1161 may profitably be compared with Public Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360, enacted by the 83d Congress on the very day it enacted Section 1161.

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[17] Contrary to the petitioner's contention (Br. 8-9), *California* v. *United States*, 438 U.S. 645 (1978), does not suggest that State licensing requirements are, under Section 1161, applicable to liquor vendor operators under tribal authority. To be sure, in that case the Court held that Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390, which directs the Secretary of the Interior to proceed "in conformity with" State law in carrying out the provisions of that Act, subjected the Bureau of Reclamation to State permit requirements respecting the appropriation and distribution of water for a federal dam project. But this conclusion rested heavily upon the historical background of federal deference to State water law, 438 U.S. at 653-663, and specific legislative history reflecting an intention to subject the Bureau to State procedures, *id.* at 665-670. Here, by contrast, the general policy of Congress has been to the contrary: to leave the reservation activities of tribal Indians free from State control, *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168, and neither the language nor the legislative history of Section 1161 reflects any intention to impose State license requirements. In any event, the issue in *California* v. *United States* was whether the Bureau of Reclamation must comply with the substantive provisions of State law; no issue was raised as to the applicability of the State's permit mechanism—the Bureau had actually applied for such a permit and contested by litigation only the enforceability of the permit conditions. 438 U.S. at 647. Moreover, *California* is to be distinguished because Section 8 of the Reclamation Act is a direct command to the Secretary to follow State law, whereas Section 1161 merely shields from federal criminal sanctions conduct taken under a governing tribal ordinance and in conformity with State law.

Public Law 280, of course, grants enumerated States general criminal and private civil adjudicatory jurisdiction in some or all of the Indian country within their borders. 18 U.S.C. 1162 and 28 U.S.C. 1360 both explicitly declare that "each of the States [enumerated] shall have *jurisdiction* * * *" in respect of matters within their scope. (emphasis added). Thus, the 83d Congress was perfectly capable of making clear its intention to confer authority upon the States in explicit terms when it wished to do so. On the other hand, because of the absence of the requisite clarity of congressional intention, the Court has recognized that separate language in Section 4(a) of Public Law 280, 28 U.S.C. 1360(a), providing that "those civil laws of [the enumerated States] that are of general application to private persons or private property shall have the same force and effect within [the designated areas of] Indian country as they have elsewhere within the State[s] * * *" does *not* authorize the exercise of "general state civil regulatory control over Indian reservations." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 384, 388-389, 390. The Court held that the quoted language merely authorizes the State courts to apply State law as a rule of decision in the private civil actions over which jurisdiction was conferred by the introductory clause of Section 1360. 426 U.S. at 384. As we have explained (pages 11-17) this Court's reasoning in *Bryan* is equally applicable to the present case.

As the Court stressed in *Bryan* (426 U.S. at 387-390) the Congress that enacted Public Law 280 (and Section 1161) also enacted several termination acts, the language of which indicates that Congress well knew how to subject an Indian tribe to the full range of State civil regulatory authority. The termination acts provide that "the laws of the several States *shall apply* to the tribe and its members *in the same manner as they apply to other citizens or persons within their jurisdiction.*" 25 U.S.C. 564q and 757 (emphasis added). The difference between this language and the bare requirement of "conformity * * * with the laws of the State" imposed by Section 1161 is striking. The statutes are to be read *in pari materia*,

Bryan, supra, 426 U.S. at 390. Plainly, Congress did not by enacting Section 1161 confer upon the States authority to apply its liquor laws to Reservation sales by tribal Indians under tribal authority "in the same manner as may apply to other citizens"; it merely required conformity with the substantive provisions of State law.

As the court of appeals explained (Pet. App. 21-A to 24-A), incorporation of substantive State standards into federal criminal statute in this manner is a familiar device previously employed by Congress when jurisdiction is not to be transferred to the States. The Assimilative Crimes Act, 18 U.S.C. 13, for example, is made applicable in some circumstances to offenses committed by tribal Indians on reservations. See 18 U.S.C. 1152; *Williams* v. *United States*, 327 U.S. 711 (1946). More directly, the Major Crimes Act, 18 U.S.C. 1153, provides that crimes enumerated therein committed by Indians in Indian country "shall be defined and punished in accordance with the laws of the State in which such offense was committed" to the extent not defined by federal law. No grant of State jurisdiction was created by these statutes. See *Williams* v. *United States, supra*, 327 U.S. at 714; *United States* v. *John*, 437 U.S. 634, 651 (1978). See, also, *Minnesota* v. *United States*, 305 U.S. 382 (1939), construing 25 U.S.C. 357. Thus, Section 1161 follows an historic pattern. The statute contemplates that the substantive standards of State law will be incorporated into the federal criminal sanctions against liquor on Indian Reservations contained in 18 U.S.C. 1154 and 1156. It does not provide that the standards will be enforced by the State through the application of license requirements.

II

THE TWENTY-FIRST AMENDMENT DOES NOT GRANT THE STATES REGULATORY JURISDICTION OVER TRIBAL INDIANS ON THEIR RESERVATIONS

In this Court, petitioner claims that the Twenty-First Amendment to the United States Constitution confers

upon the States regulatory jurisdiction over liquor activities of tribal Indians or entities within the confines of an Indian Reservation.[18] As early as 1938, *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938), and as recently as 1973, *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973) ("*State Tax Commission I*"), however, this Court has held that under the Twenty-First Amendment a State's territorial jurisdiction to regulate the sale of liquor or to impose licensing requirements reaches only as far as its pre-existing jurisdiction.

In *Collins*, California had reserved taxing jurisdiction within certain areas of Yosemite National Park at the time it conveyed those areas to the United States; otherwise jurisdiction rested exclusively in the United States. See 304 U.S. at 525, 530. Because of the express reservation of taxing jurisdiction, the State's authority to tax liquor transactions within the areas of the park granted by the State was sustained. *Id.* at 534-536. On the other hand, the Court held that the State lacked authority to regulate liquor traffic or require liquor licenses within the park. *Id.* at 533-534. The Court rejected California's contention that the Twenty-First Amendment empowered it to exercise the disputed authority, reasoning that, while "the Amendment may have increased 'the state's power to deal with [commerce in liquor] . . ., it did not increase its jurisdiction.'" 304 U.S. at 538 (quoting with approval the conclusion of a three-judge district court). Because the State had no authority to regulate commerce in alcohol *within the Park* before the ratification of the Twenty-First Amendment, the enhanced power afforded the State by that provision did not create such jurisdiction. *Ibid.*

In *State Tax Commission I*, *supra*, *the* Court reaffirmed the holding of *Collins*, holding that, notwithstand-

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[18] As indicated above (page 5), petitioner did not present this contention in the court of appeals. It was, however, considered by the court of appeals in response to the submission of the State of Washington in the companion cases (see page 6, *supra*).

ing the Twenty-First Amendment, the State had no authority "to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into" military bases over which the United States exercised exclusive jurisdiction. 412 U.S. at 373-377. The Court reiterated that the Twenty-First Amendment increased the power of the States within the area of its jurisdiction but not the geographical reach of that jurisdiction. 412 U.S. at 378. On the other hand, the Court made clear (*id.* at 379-381) that as to military bases within the concurrent jurisdiction of the State, reliance on the Twenty-First Amendment was not necessary to support the exercise of State jurisdiction over liquor—the only question remaining was whether some provision of federal law affirmatively barred the exercise of State authority. In sum, the Twenty-First Amendment simply has no bearing upon the territorial reach of the State's jurisdiction to regulate commerce in liquor.[19]

After a remand to the trial court for disposition of the issues unresolved in *State Tax Commission I*, *in United States* v. *State Tax Commission*, 421 U.S. 599 (1975) (*"State Tax Commission II"*), the Court struck down the disputed State liquor tax as applied to federal reservations subject to concurrent State jurisdiction on the ground that the tax was unconstitutionally imposed upon an instrumentality of the United States. The Court re-

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[19] The petitioner attempts to distinguish *Collins* and *State Tax Commission I* (Br. 87-88) as based upon the authority of the United States over its "real property and instrumentalities, such as national parks or military reservations," explaining that "Congress' power to regulate liquor traffic in Indian country stems from its power over Indian people and their affairs, not their land or instrumentalities." The attempted distinction is artificial. Congress' power respecting Indian tribes is plenary and rests upon Article I, Section 8, Cl. 3 and Art. II, Section 2, Cl. 2 of the Constitution. See *McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 172 n.7. The authority of the United States extends without distinction to the Reservations set aside for the benefit of the Indians, legal title to which is held in trust by the United States, and to the Indian tribes and their members.

jected the State's contention that the Twenty-First Amendment abolished the immunity of federal instrumentalities from State taxation in the area as to commerce in liquor, describing as "patently bizarre" and "extraordinary" the "suggest[ion] that the Twenty-first Amendment abolished federal immunity." The language and history of that Amendment are equally devoid of support for the novel contention that the States were thereby granted plenary jurisdiction to legislate in this area respecting Indian Reservations.[20]

The authority claimed by petitioner accordingly cannot be sustained. The State here seeks to enforce its licensing requirement against a tribal Indian operating within a Reservation under tribal authority. Neither that licensing requirement nor a licensing fee can be justified as necessary to regulate transportation of liquor from the

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[20] Citing *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), petitioner argues (Br. 87 n.12) that the second *State Tax Commission* case is inapposite because the federal instrumentality analysis has been rejected in Indian cases. We do not suggest that respondent is a federal instrumentality and for that reason constitutionally immunized from State licensing requirements. On the other hand, *Mescalero Apache Tribe* v. *Jones*, itself reflects the sharp distinction the Court has observed between State authority as to the Reservation affairs of tribal Indians and State authority respecting off-Reservation activities. 411 U.S. at 147-155. Indeed, the Court there recognized the "historic *immunity* from state and local control" of "Indian tribes and their reservation lands." 411 U.S. at 152 (emphasis added). And it is not inapt to describe as an immunity the longstanding policy of the United States of " 'leaving Indians free from state jurisdiction and control' " (*McClanahan* v. *Arizona Tax Commission*, *supra*, 411 U.S. at 168, quoting *Rice* v. *Olson*, 324 U.S. 786, 789 (1945)). See also *Worcester* v. *Georgia*, 31 U.S. [6 Pet.] 515, 557 (1832) ("The Cherokee Nation * * * is a distinct community * * * in which the laws of Georgia can have no force.") This "historic immunity," although analytically distinct from the special immunity from State taxation of federal instrumentalities, is no more lightly to be set aside absent a clear indication that that result was intended. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392.

Reservation to areas within State jurisdiction. See *United States* v. *State Tax Commission*, *supra*, 412 U.S. at 376-377; *Collins* v. *Yosemite Park & Curry Co.*, *supra*, 304 U.S. at 533.[21]

* * * * *

In closing, we note that the State of California is not powerless to enforce its State liquor policies against tribal Indians with respect to their activities on a Reservation. As a Public Law 280 State (see 18 U.S.C. 1162), California may prosecute an Indian for violation of criminal proscriptions that do not rest upon an underlying license requirement or the terms of a license. For example, the proscriptions against sale of liquor between 2 a.m. and 6 a.m., Cal. Penal Code § 398 (West 1954) and against sale to minors, Bus. & Prof. Code § 25658, would appear to be enforceable against Indian sellers.[22] In addition, expressions of State liquor policy in the general civil laws of the State such as those that govern the tort liability of purveyors of alcohol for tortious acts committed by those who consume it, see, e.g., Bus. & Prof. Code §§ 25602(b) and (c), 25602.2 (Cum. Supp. 1982), would be applicable as rules of decision in private civil actions brought in State court against an individual Indian under the civil jurisdiction conferred by Public Law 280, 28 U.S.C. 1360. In addition, the State authorities remain free to cooperate actively with the Secretary of the Interior, the United States Attorneys and the tribal governments to insure that the substantive requirements of State law are not flouted.[23] This may be accomplished through the exercise

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[21] We note that concerns about the location of liquor establishments (see Pet. Br. 70) are, in the context of Reservation activities, legitimately the concern of tribal government. See *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975).

[22] By contrast a misdemeanor prosecution under Bus. & Prof. Code § 23301 would be barred because the State lacks authority to apply the license requirement of Section 23300 to Reservation vendors of alcohol acting under tribal authority.

[23] We understand that upon remand (see page 6, *supra*) the companion case below, *Muckleshoot Indian Tribe* v. *Washington*, was settled by an agreement among the parties.

of the Secretary's statutory authority to certify tribal ordinances, the sanctions available to the tribes against their members and permittees and, where necessary, through invocation of the available federal criminal sanctions.[24] What the petitioner cannot do is to require respondent to seek permission from the State and to pay a license fee for the privilege of engaging in liquor transactions on the Pala Reservation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1983

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[24] Resort to federal criminal prosecution is obviously the enforcement mechanism directly contemplated by Congress in framing Section 1161 as an exemption from the otherwise applicable federal liquor laws. Although resort to prosecution is likely to be reserved for extreme cases, any contention that this enforcement mechanism is inadequate must be directed to a legislative forum rather than this Court. See page 19 note 15, *supra*.

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'SHOW ^ PROCEEDINGS AND ORDERS DATE: 032383

CASE NBR 82-1-00401 CFX
SHORT TITLE Rice, Baxter, etc. DOCKETED: Aug 31 1982
VERSUS Rehner, Eva

Date	Proceedings and Orders
Aug 31 1982	Petition for writ of certiorari filed.
Oct 5 1982	Brief amicus curiae of State of Washington filed.
Oct 12 1982	Brief of respondent Eva Rehner in opposition filed.
Oct 13 1982	DISTRIBUTED. October 29, 1982
Jan 21 1983	Petition GRANTED.
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Dec 16 1982	Brief of petitioner Baxter Rice, etc. filed.
Dec 16 1982	Joint appendix filed.
Dec 16 1982	Brief amicus curiae of National Alcoholic Beverage Control Association filed.
Dec 17 1982	Brief amicus curiae of State of Minnesota, et al. filed.
Dec 18 1982	Brief amicus curiae of State of Montana filed.
Dec 27 1982	Order extending time to file brief of respondent on the merits until January 24, 1983.
Jan 21 1983	Order further extending time to file brief of respondent

CONTINUE '
'SHOW ^ PROCEEDINGS AND ORDERS DATE: 0323^3

CASE NBR 82-1-00401 CFX
SHORT TITLE Rice, Baxter, etc. DOCKETED: Aug 31 198^
VERSUS Rehner, Eva

Date	Proceedings and Orders
Jan 21 1983	Order further extending time to file brief of respondent on the merits until January 28, 1983.
Jan 24 1983	Brief amicus curiae of Mescalero Apache Tribe filed.
Jan 24 1983	Brief amicus curiae of Shoshone Tribe, et al. filed.
Jan 27 1983	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 28 1983	Brief amicus curiae of Aqua Caliente Band of Indians filed
Jan 28 1983	Brief amicus curiae of United States filed.
Jan 31 1983	Brief of respondent Eva Rehner filed.
Jan 31 1983	Brief amicus curiae of Tulalip & Muckleshoot Indians filed
Feb 3 1983	Brief amicus curiae of Pala Band of Mission Indians filed.
Feb 15 1983	SET FOR ARGUMENT. Monday, March 21, 1983. (4th case)
Feb 22 1983	Motion of the Solicitor General for leave to participate in oral GRANTED.

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CASE NBR 82-1-00401 CFX
SHORT TITLE Rice, Baxter, etc. DOCKETED: Aug 31 198?
VERSUS Rehner, Eva

Date	Proceedings and Orders
Feb 15 1983	CIRCULATED.
Feb 22 1983	Record filed.
Feb 22 1983	Certified original record & C.A. proceedings, 3 volumes received.
Mar 14 1983	Reply brief of petitioner Baxter Rice, etc. filed.
Mar 21 1983	ARGUED.